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A CODE
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EMBODYING ENACTMENTS OF CONGRESS, CONSTITUTIONAL PROVISIONS
ESTABLISHED PRINCIPLES, AND COURT RULES, IN FORCE
DECEMBER 1, 1906, AND THE BANKRUPTCY ACT OF
1898, WITH AMENDMENTS AND ORDERS,
TOGETHER WITH A COLLECTION
OF FORMS AND PRECEDENTS.

BY
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Author of "Notes on United States Reports."

IN THREE VOLUMES.
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CHAPTER 33.

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§ 1135. What causes are removable.

The statutory provisions prescribing the causes over which the circuit court may take jurisdiction by removal, and the persons entitled to remove a controversy from a State court to the circuit court, are contained in another chapter.¹

Author's section.

¹Ante, §§ 133 et. seq.

§ 1136. Removal petition—time for filing.

Whenever any party entitled to remove^[b] any suit mentioned in the next preceding section,² except in such cases as are provided for in the last clause of said section, [i. e. removal on the ground of local prejudice.]³ may desire to remove such suit from a State court^[c] to a circuit court of the United States, he may make and file a petition^{[d]-[h]} in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff,^{[i]-[m]} for the removal of such suit into the circuit court, to be held in the district^[n] where such suit is pending.

Part of § 3, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, 24 Stat. 552, as corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 510.

[a] History of provision—inapplicable to prejudice and local influence cases.

As originally enacted in 1875 this portion of the statute provided that "whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending." The earlier provision of R. S. § 639, based upon an act of 1860 was yet more liberal as to time of removal and permitted removal "at any time before the trial or final hearing."⁴ The recent legislation therefore shows a marked tendency to restrict the exercise of the right of removal.⁵

As originally enacted the statute of 1875 did not cover the right of removal for prejudice and local influence, but left the portion of R. S. § 639 dealing therewith in force. It is to be observed that the mode of proceeding prescribed by the amendatory acts of 1887 and 1888 supra, and now in force, does not apply to cases where removal is sought for prejudice or local influence. In such cases removal may still be had at any time before the trial thereof."⁶ Since the act of 1887 removal can only be had by a defend-

²See ante, §§ 133-136.

³Ante, § 136. For procedure in such cases see post, § 1143.

⁴See *Winkler v. Chicago*, etc. R. R. 108 Fed. 307. The act of 1789, § 12 (1 Stat. 73 C. 20.), required removal petition to be filed when appearance was entered.

⁵See infra note [i].

⁶Ante, § 137. *Fisk v. Henarie*, 142 U. S. 466, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; *Whelan v. New York*, etc. R. R. 35 Fed. 849, 1 L.R.A. 65; *Hanrick v. Hanrick*, 153 U. S. 197, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; *Tennessee v. Union*, etc. Bank, 152 U. S. 454, 38 L. ed. 512, 14 Sup. Ct. Rep. 654; *Tullock v. Webster Co.* 40 Fed.

ant to a controversy,⁷ and hence the substitution of "any party" ut supra, for "one or more of the plaintiffs or defendants."

[b] Parties entitled to remove.

The broad question as to what persons have a right of removal is necessarily involved in the discussion elsewhere,¹⁰ of the circuit court's jurisdiction upon removal. Except in case of a separable controversy,¹¹ it is the rule that if one of the parties entitled to remove has lost his right by failure to exercise it in due time, the right of all is barred.¹² Where one defendant has suffered a default his co-defendant cannot remove.¹³ So one who makes himself a party by intervention or otherwise is subject to all existing obstacles to removal.¹⁴ Though if plaintiff adds a party defendant who is in fact the proper defendant, and the proceeding is discontinued against another, the new defendant's right of removal is unaffected by the non-action of the first.¹⁵ Indeed it would seem that any change in parties amounting in effect to the institution of a new suit would initiate a new right of removal unaffected by the prior status of the case.¹⁷ It has been held recently that a new defendant may remove where a Federal question exists, though the original defendant has lost his right and there is no separable controversy.¹⁸ A state court having acquired jurisdiction of a foreign corporation by proceeding of foreign attachment, a Federal court has jurisdiction on the removal of the cause by a garnishee.¹⁹ All the parties entitled to remove must join in the petition.²⁰ Substituted parties are subject to the disabilities of their predecessors as respects removal.¹ A bank receiver cannot remove a suit in which he is substituted after his ap-

706; *Campbell v. Collins*, 62 Fed. 849.

⁷Except however in cases of claimants under land grants from different states. See post, § 1139.

¹⁰Ante, § 133 et. seq.

¹¹Ante, § 135.

¹²*Fletcher v. Hamlet*, 116 U. S. 410, 29 L. ed. 679, 6 Sup. Ct. Rep. 426; *Rogers v. VanNortwick*, 45 Fed. 514; *Calderhead v. Downing*, 103 Fed. 27.

¹³*Brooks v. Clarke*, 119 U. S. 511, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; *Patchin v. Hunter*, 38 Fed. 52; *Lederer v. Sire*, 105 Fed. 530.

¹⁴*Cable v. Ellis*, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85; *Jefferson v. Driver*, 117 U. S. 274, 29 L. ed. 898, 6 Sup. Ct. Rep. 730; *Brooks v. Clark*, 119 U. S. 513, 30 L. ed. 485, 7 Sup. Ct. Rep. 304; *Olds Co. v. Benedict*, 67 Fed. 4, 14 C. C. A. 285; *Farmers', etc. Bank v. Schuster*, 86 Fed. 165, 29 C. C. A. 649; *Kidder*

v. Ins. Co. 117 Fed. 999; *Hakes v. Burns*, 40 Fed. 33.

¹⁵*Amer. Nat. Bank v. Nat. B. Co.* 70 Fed. 422.

¹⁷See *Shirley v. Waco T. P.* 13 Fed. 705, 4 Woods, 411.

¹⁸*Green v. Valley*, 101 Fed. 882.

¹⁹*Greedy v. Jacob Tome Institute*, 132 Fed. 408.

²⁰*Fletcher v. Hamlet*, 116 U. S. 410, 29 L. ed. 679, 6 Sup. Ct. Rep. 426; *Stone v. South Carolina*, 117 U. S. 433, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Chicago, etc. Ry. v. Martin*, 178 U. S. 249, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854.

¹*Houston, etc. Ry. v. Shirley*, 111 U. S. 361, 28 L. ed. 455, 4 Sup. Ct. Rep. 472; *Goodnow v. Dolliver*, 26 Fed. 470 (administrator); *Richmond, etc. R. R. v. Findley*, 32 Fed. 642 (lessee); *Burnham v. First Nat. Bank*, 53 Fed. 167, 3 C. C. A. 486; *Jarboe v. Templer*, 38 Fed. 217.

pointment.² Discontinuance against one whose presence is a mere device to bar removal, will enable the remaining defendants then to remove.³

[c] Section permits removal only from "a State court."

It makes no difference whether the State court is of limited or of general jurisdiction.⁶ But a county board of commissioners is not a State court,⁷ and it has been said that a justice's court is not a State court.⁸ When the State law provides for appeal from county commissioners to the State court and the issue is there triable as an original proceeding, removal may be had within proper time after the proceeding is initiated in the court.⁹

[d] Necessity for petition and for notice of hearing.

The transfer of the right to hear and decide a cause from the State to the Federal court is effected by the filing of proper removal petition and bond.¹² These may therefore be considered jurisdictional requirements necessary to initiate the proceedings in the Federal court, just as some sort of complaint, bill, or declaration by a plaintiff is a necessary preliminary to the exercise of jurisdiction in any cause. It is settled that they cannot be dispensed with by stipulation or consent.¹³ It is unnecessary to give notice to the opposite party of the time and place of presenting the petition and bond for removal,¹⁴ regardless of the requirements of State rules of practice.¹⁵ The proceeding is *ex parte*.¹⁶ No order of removal need be made.¹⁷

[e] Filing petition in State court.

The petition and bond should be filed in the court, which, in most jurisdictions, means in the clerk's office of the county in which the venue is laid, just as other papers in a suit are filed; and the approval of them, when filed in another county where the court is then sitting, will not effect a

²Speckert v. German Nat. Bank, 98 Fed. 154, 38 C. C. A. 682.

³Infra note [1].

⁶Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524.

⁷Fuller v. Colfax Co. 14 Fed. 177,

4 McCrary, 535.

⁸Rathbone Oil Co. v. Rauch, 5 W. Va. 79.

⁹Delaware Co. Comrs. v. Diebold, 133 U. S. 487, 33 L. ed. 674, 10 Sup. Ct. Rep. 399.

¹²Manning v. Amy, 140 U. S. 140, 35 L. ed. 386, 11 Sup. Ct. Rep. 707; Marshall v. Holmes, 141 U. S. 595, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; The filing of petition without bond is not enough: Gregory v. Hartley, 113 U. S. 745, 28 L. ed. 1150, 5 Sup. Ct. Rep. 743; Crehore v. Ohio, etc. Ry. 131 U. S. 244, 33 L. ed. 144, 3 Sup. Ct. Rep. 692.

¹³Kingsbury v. Kingsbury, 3 Biss. 60, Fed. Cas. No. 7,817; First Nat. Bank of Parkersburg v. Prager, 91 Fed. 689, 34 C. C. A. 51; Olds W. Works v. Benedict, 67 Fed. 1, 14 C. C. A. 285. The petition would seem to be a pleading rather than process, see infra note [f].

¹⁴Fisk v. R. R. Co. 8 Blatchf. 247, Fed. Cas. No. 4,828; Young v. Merchants Ins. Co. 29 Fed. 274; Stasburger v. Beecher, 44 Fed. 213; Ashe v. Union Cent. L. I. Co. 115 Fed. 235.

¹⁵Chiatovich v. Hauchett, 78 Fed. 193.

¹⁶Creagh v. Equit. L. Ass. 83 Fed. 849.

¹⁷Ashe v. Union C. L. I. Co. 115 Fed. 235. See post, § 1138[d].

removal.²⁰ But when presented to the court the petition and bond are deemed part of the record even though not marked "filed,"²¹ and if actually filed errors of the clerk in the docketing are immaterial.²² It is at least proper if not essential that they be presented in some way to the court as well as filed with the clerk.²³ An oral motion for removal is sufficient presentation,²⁴ as is also a presentation to the judge in his chambers.²⁵ Removal cannot be granted on petition to the circuit court,²⁶ except in cases of prejudice and local influence which are not governed by the above provision.²⁷ The question whether an appearance to file a removal petition is a general appearance is elsewhere considered.²⁸

[f] Nature and requisites of petition in general.

In a recent case removal petition is said to be process,¹¹ although the cases generally have held it a pleading.¹² It should state facts, not a legal conclusion, as, that a Federal question is involved,¹³ or that a party is only a nominal defendant.¹⁴ Argumentative allegations of the jurisdictional facts are insufficient,¹⁵ or alternative allegations as to citizenship.¹⁶ It should show the facts upon which the right of removal is based,¹⁷ and a right to removal in the petitioner.¹⁸ It is part of the record proper and should show the Federal jurisdiction affirmatively.¹⁹ It may controvert allegations of the complaint;²⁰ though it need not restate such facts as already appear from plaintiff's pleading,²¹ since those facts are available in its aid.²² It is not a fatal objection that the petition relies upon the wrong

²⁰Noble v. Mass. B. Assn. 48 Fed. 337.

²¹Waite v. Phenix Ins. Co. 62 Fed. 769.

²²Wills v. Baltimore, etc. R. R. 65 Fed. 532.

²³See post, § 1138[c].

²⁴Mays v. Newlin, 143 Fed. 574.

²⁵Madisonville T. Co. v. St. Bernard, etc. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251.

²⁶Mayo v. Dockery, 108 Fed. 899.

²⁷See Hall v. Chattanooga A. Wks. 48 Fed. 602.

²⁸Ante, § 860.

¹¹Kinney v. Col. S. & L. Asso. 191 U. S. 82, 48 L. ed. 105, 24 Sup. Ct. Rep. 30.

¹²Gold W. etc. Co. v. Keyes, 96 U. S. 202, 203, 24 L. ed. 656, and see cases in next note.

¹³Gold W. etc. Co. v. Keyes, 96 U. S. 202, 203, 24 L. ed. 656; Hambleton v. Duham, 22 Fed. 465, 10 Sawy. 489; Mackaye v. Mallory, 6 Fed. 751,

752, 19 Blatchf. 165; Tremper v. Schwabacker, 84 Fed. 415.

¹⁴McDonnell v. Jordan, 178 U. S. 234, 44 L. ed. 1050, 20 Sup. Ct. Rep. 886; State v. Coosaw M. Co. 45 Fed. 809.

¹⁵Mayer v. Denver R. R. 41 Fed. 723.

¹⁶Tremper v. Schwabacher, 84 Fed. 415.

¹⁷Martin v. Baltimore, etc. Co. 151 U. S. 691, 38 L. ed. 318, 14 Sup. Ct. Rep. 540.

¹⁸Crehore v. Ohio, etc. Ry. 131 U. S. 244, 33 L. ed. 144, 9 Sup. Ct. Rep. 692.

¹⁹Carson v. Dunham, 121 U. S. 430, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Carlisle v. Sunset T. Co. 116 Fed. 896.

²⁰Mackaye v. Mallory, 6 Fed. 751, 19 Blatchf. 165.

²¹Gold W. Co. v. Keyes, 96 U. S. 204, 24 L. ed. 656.

²²Freeman v. Butler, 39 Fed. 2.

statutory provision³ or upon the wrong ground,⁴ if in fact it makes out a removable case. Other facts will not be judicially noticed by the court,⁵ or supplied by intendment.⁶ When removal is sought because the cause is claimed to be one arising under the Federal Constitution and laws, the rule is that that must appear from plaintiff's own pleading and hence in such cases the petition cannot supply necessary facts.⁷ A petition for removal upon which action is prayed only in case certain defenses are overruled, is invalid.⁸

[g] Form of petition.

The petition should be entitled in the cause.¹¹ The allegations of the petition to show Federal jurisdiction should be positive and certain, and not merely on information and belief.¹² While the statute does not require verification of the petition¹³ it has frequently been declared to be better practice to verify,¹⁴ especially where it bases the right of removal upon the existence of certain facts, not in the record.¹⁵ While, if the facts upon which the right to remove is based appear elsewhere from the record, there is less need for verification.¹⁶ Verification by agent or attorney is sometimes proper.¹⁷ Even in cases where the petition should be verified, the absence of oath is at most an informality that may be waived.¹⁸ The petition should be signed, although signature by attorney is sufficient.¹⁹ Want of proper signature is an informality that is waived by failure to object.²⁰ Want of direct averment of the existence of a controversy is not a fatal objection.¹

³Canal Street R. R. Co. v. Hart, 114 U. S. 660, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127; Kelly v. Houghton, 23 Fed. 417; Kaeiser v. Ill. C. R. R. 6 Fed. 4, 2 McCrary, 187; Norris v. Mineral W. Co. 7 Fed. 272, 19 Blatchf. 201.

⁴Burnham v. Chicago, etc. R. R. 4 Dill. 503, Fed. Cas. No. 2,174; Osgood v. Chicago, etc. R. R. Co. 6 Biss. 330, Fed. Cas. No. 10,604; Merchants Nat. Bank v. Thompson, 4 Fed. 878; Ruckman v. Ruckman, 1 Fed. 587.

⁵Mountain V. etc. Co. v. McFadden, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488.

⁶Arkansas v. Kansas, etc. Co. 183 U. S. 189, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

⁷Ante, § 129.

⁸Manning v. Amy, 140 U. S. 137, 35 L. ed. 386, 11 Sup. Ct. Rep. 707.

¹¹See Egan v. Chicago, etc. R. R. 53 Fed. 675.

¹²Wolff v. Archibald, 14 Fed. 369,

¹⁴McCrary, 581.

¹³Houser v. Clayton, 3 Woods, 277, Fed. 675.

Fed. Cas. No. 6,739; Free v. Western Union T. Co. 122 Fed. 311; Howard v. Gold R. Co. 102 Fed. 657.

¹⁴Kansas City R. R. v. Daughtry, 138 U. S. 303, 34 L. ed. 965, 11 Sup. Ct. Rep. 306; Houser v. Clayton, 3 Woods, 277, Fed. Cas. No. 6,739; Wormser v. Dahlmann, 16 Blatchf. 319, Fed. Cas. No. 18,048.

¹⁵Harley v. Home Ins. Co. 125 Fed. 793.

¹⁶Howard v. Gold R. Co. 102 Fed. 657; Harley v. Home Ins. Co. 125 Fed. 792.

¹⁷See Wormser v. Dahlman, 16 Blatchf. 319, Fed. Cas. No. 18,048.

¹⁸Street R. R. v. Hart, 114 U. S. 660, 29 L. ed. 228, 5 Sup. Ct. Rep. 1131.

¹⁹Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791; Cooke v. Seligman, 7 Fed. 266, 17 Blatchf. 452.

²⁰Myer v. Construction Co. (Removal cases) 100 U. S. 471, 25 L. ed. 593.

¹Egan v. Chicago, etc. R. R. 53

[h] — amendment of petition.

Before the expiration of the time for removal the petition may undoubtedly be amended or a second petition may be filed in the State court.⁴ After that time a second or amended petition cannot be deemed to relate back to the filing of the first, so as to be in time.⁵ The first is functus officio after a remand by the circuit court.⁶ In the Federal court the petition may be amended, provided originally it stated a ground for removal, so as to state the facts in the original petition with greater fullness or precision, or even to supply another ground.⁷ Thus an inadvertent failure to allege properly the requisite diverse citizenship may be corrected by amendment in the circuit court when enough appeared in the original petition or the record to amend by.⁸ That court may also upon the setting aside of the service of summons on defendant's motion, permit plaintiff to file an amended petition and order summons to issue.⁹ Verification may be added by amendment in the circuit court;¹⁰ or "circuit" court substituted for inadvertent "district" court;¹¹ or error in division of the Federal district corrected.¹²

But if the petition was wholly insufficient as filed in the State court no amendment in the Federal court can remedy the defect.¹⁴ Failure to allege the diverse citizenship as existing when suit brought as well as when petition filed, is not curable by amendment in the circuit court.¹⁵ Averment of residence cannot be changed to an averment of citizenship.¹⁶ Failure to aver the citizenship of a corporation, or of plaintiff may not be

⁴See *Mitchell v. Smale*, 140 U. S. 409, 35 L. ed. 443, 11 Sup. Ct. Rep. 819, 840; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 355.

⁵*Brigham v. Thompson* L. Co. 55 Fed. 881; see *Frisbie v. Chesapeake Ry.* 59 Fed. 369; contra *Freeman v. Butler*, 39 Fed. 4.

⁶*Jones v. Mosher*, 107 Fed. 561, 46 C. C. A. 471.

⁷*Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Crehore v. Ohio*, etc. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Martin v. Baltimore*, etc. R. R. 151 U. S. 691, 38 L. ed. 318, 14 Sup. Ct. Rep. 540; *Powers v. Chesapeake R. R.* 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; *Tremper v. Schwabacher*, 84 Fed. 415; *Deford v. Mahaffy*, 13 Fed. 481; *Freeman v. Butler*, 39 Fed. 4; *Houser v. Clayton*, 3 Woods, 273, Fed. Cas. No. 6,739; *Waite v. Phenix Ins. Co.* 62 Fed. 769; *Cameron v. Hodges*, 127 U. S. 324, 32 L. ed. 133, 8 Sup. Ct. Rep. 1156.

⁸*Robertson v. Scottish*, etc. Co. 68 Fed. 176; *Kerr v. Modern Woodman*, 117 Fed. 593, 54 C. C. A. 665; *John-*

son v. Mfg. Co. 76 Fed. 616; *Barclay v. Levee Comm'rs.* 1 Wood. 254, Fed. Cas. No. 977; *Kinney v. Columbia Assn.* 191 U. S. 81, 48 L. ed. 105, 24 Sup. Ct. Rep. 32.

⁹*United States*, etc. Co. v. Board of Commissioners, 145 Fed. 144, (C. C. A.)

¹⁰*Houser v. Clayton*, 3 Wood. 273, Fed. Cas. No. 6,739.

¹¹*Hadfield v. Northwestern* L. A. Co. 105 Fed. 530.

¹²*Hodge v. Chicago*, etc. Ry. 121 Fed. 51.

¹⁴*Burlington*, etc. R. R. v. *Dunn*, 122 U. S. 516, 30 L. ed. 1160, 7 Sup. Ct. Rep. 1262; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 133, 8 Sup. Ct. Rep. 1154; *Crehore v. Ohio R. R.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Murphy v. Payette Co.* 98 Fed. 321; *Yarnell v. Felton*, 102 Fed. 369.

¹⁵*Jackson v. Allen*, 132 U. S. 34, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Dalton v. Germania Ins. Co.* 118 Fed. 937.

¹⁶*Grand Trunk R. R. v. Twitchell*,

cured,¹⁷ unless there is something in the record otherwise establishing the diverse citizenship.¹⁸ The allowance of amendment by the circuit court is discretionary.¹⁹ On appeal a defective petition cannot be corrected.²⁰

[i] Time for removal.

Successive statutes since 1866 have abridged the time within which the right of removal must be exercised;⁴ and in construing the present law that tendency to a restriction of the right, is to be given due weight.⁵ By the words before the time "to answer or plead" Congress intended to require the petition to be filed as soon as the State law required any defense whatever to be put in, including demurrer as well as answer of plea;⁶ and dilatory pleas as well as pleas in bar.⁷ The limitation of time as fixed by the statute is inflexible and imperative and may not be extended by the court in view of ignorance or accident preventing compliance by a party.⁸ The fact that a State law gives time after answer for filing an amended answer, will not enlarge the period for filing removal petition;⁹ nor is it enlarged by the failure of plaintiff to enter a default at the end of the prescribed time,¹⁰ nor by the fact that a default judgment may be opened and retried within two years;¹¹ nor by the fact that a matter tried

59 Fed. 727, 8 C. C. A. 237. But see *Parker v. Overman*, 18 How. 137, 15 L. ed. 318.

¹⁷*Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 133, 8 Sup. Ct. Rep. 1154; *DeLoy v. Trav. Ins. Co.* 59 Fed. 319.

¹⁸*Kinney v. Columbia Sav. & L. Asso.* 191 U. S. 80, 48 L. ed. 105, 24 Sup. Ct. Rep. 30.

¹⁹*Ayres v. Watson*, 137 U. S. 585, 34 L. ed. 803, 11 Sup. Ct. Rep. 201.

²⁰*Cameron v. Hodges*, 127 U. S. 324, 32 L. ed. 132, 8 Sup. Ct. Rep. 1156. But where the cause was brought in the Federal court, the record may be amended by consent: *Fitchburg v. Nichols*, 85 Fed. 869, 29 C. C. A. 464 and cases cited.

⁴*Supra* note [a].

⁵*Daugherty v. W. W. T. Co.* 61 Fed. 139; *Winkler v. Chicago, etc. R. R.* 108 Fed. 307. It is not intended that a party may experiment in the state court and then remove: *Rosenthal v. Coates*, 148 U. S. 142, 37 L. ed. 399, 13 Sup. Ct. Rep. 576.

⁶*Martin v. Baltimore, etc. R. R.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Goldey v. Morning News*, 156 U. S. 524, 525, 39 L. ed. 520, 15 Sup. Ct. Rep. 559; *Powers v. Chesapeake, etc. R. R.* 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep.

264; *Winkler v. Chicago, etc. R. R.* 108 Fed. 307, and cases cited: *Fidelity Co. v. Newport, etc. Co.* 70 Fed. 404; *Frink v. Blackington Co.* 80 Fed. 307; *Wilcox, etc. Co. v. Phoenix Ins. Co.* 60 Fed. 931. Contra see *Tennessee, etc. Co. v. Waller*, 37 Fed. 545; *McDonald v. Hope M. Co.* 48 Fed. 593.

⁷*Martin v. Baltimore, etc. R. R.* 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Fidelity, etc. Co. v. Hubbard*, 117 Fed. 949; *Head v. Sellick*, 110 Fed. 786; *First, etc. Co. v. Conn. etc. Co.* 71 Fed. 225. See *Browning v. Reed*, 39 Fed. 625. Contra, see *Wison v. Winchester R. R.* 82 Fed. 17; *Mahoney v. New, etc. Assoc.* 70 Fed. 513.

⁸See *Kansas R. R. v. Daugherty*, 138 U. S. 303, 34 L. ed. 965, 11 Sup. Ct. Rep. 306; *Daugherty v. W. W. T. Co.* 61 Fed. 138.

⁹*Doyle v. Beaupre*, 39 Fed. 289.

¹⁰*Kansas, etc. R. R. v. Daughtry*, 138 U. S. 303, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Kaitel v. Wylie*, 38 Fed. 865; *Davis v. Tillotson*, 48 Fed. 606. But see: *Lockhart v. Memphis R. R.* 38 Fed. 274.

¹¹*Davis v. Harris*, 124 Fed. 713. But see *Lockhart v. Memphis R. R.* 38 Fed. 274.

in the probate court may thereafter be tried de novo in the court of general jurisdiction.¹² Amendment of a removal petition will not be held to relate back to the time of original filing so as to come within the statutory requirement.¹³ When the State laws permits a party dissatisfied with the damages assessed by condemnation commissioners to file a demand for jury trial with the county clerk, it has been held that petition for removal should be taken within that time.¹⁴

Since the statute permits removal any time before defendant is required to put in a defense, petition within that time may be filed, although the party has already answered,¹⁵ and may be filed with the answer¹⁶ or with or after demurrer,¹⁷ so long as the time has not elapsed. Preliminary proceedings in a cause such as appearance to dissolve an attachment,¹⁸ or an injunction,¹⁹ or to resist a receivership application²⁰ constitute no bar to the right of removal so long as the time to plead or answer has not elapsed. By "rule of court" Congress intended to refer to the practice in those States where time to plead is not fixed by statute, as, where a statute fixes the time for appearance and rules of court fix the time to plead.¹ The phrase does not apply to a statute requiring defendant to answer at a certain time "unless longer time be granted by the court;"² or to any rule permitting pleading after the statutory time.³ It is sufficient if the petition and bond are filed within the prescribed time although not acted upon by the State court until afterwards.⁴

[j] — when time begin to run.

Ordinarily time to plead or answer does not begin to run until valid service of summons.⁷ If summons is served by publication the time runs from the completion of the service in that mode.⁸ Service of summons may, however, not mark the beginning of the period where by the practice peculiar to some States it is in advance of service of copy of the declara-

¹²*Schneider v. Eldredge*, 125 Fed. 639. ¹³*Brigham v. Thompson Co.* 55 Fed. 881. *Contra Freeman v. Butler*, 39 Fed. 4.

¹⁴*Minneapolis R. R. v. Nestor*, 50 Fed. 1. ¹⁵*Gavin v. Vance*, 33 Fed. 84. ¹⁶*Brisenden v. Chamberlain*, 53 Fed. 307; *Youtsey v. Hoffman*, 108 Fed. 699. See *Egan v. Chicago*, etc. R. R. 53 Fed. 675.

¹⁷*Duncan v. Assoc. Press*, 81 Fed. 417; *Whitely v. Sterling*, etc. Co. 83 Fed. 853; *Conner v. Skagit Co.* 45 Fed. 802; *Tennessee*, etc. Co. v. *Waller*, 37 Fed. 545.

¹⁸*Whitely Co. v. Sterling*, etc. Co. 83 Fed. 853. ¹⁹*Garrard v. Silver P. M. Co.* 76 Fed. 919.

²⁰*Sidway v. Missouri L. Co.* 116 Fed. 381. ¹See *Amsden v. Norwich*, etc. Soc. 44 Fed. 515; *Conner v. Skagit*, 45 Fed. 802, 804; *Daugherty v. W. U. T. Co.* 61 Fed. 138; *Spangler v. Atchison*, etc. R. R. 42 Fed. 305.

²*Fidelity Co. v. Newport*, etc. Co. 70 Fed. 403. ³*Burck v. Taylor*, 39 Fed. 581.

⁴By some authorities it is not necessary to present the matter to the state court at all. See post, § 1138 [c].

⁷*Tortat v. Hardin M. Co.* 111 Fed. 426.

⁸*Tenney v. Am. P. M. Co.* 96 Fed. 919.

tion.⁹ Where a defendant appears generally in the State court without service of process, his time for removal then begins to run;¹⁰ but not if he appears specially.¹¹

[k] — extensions of time to plead as enlarging time for removal.

Any discretionary extension of time to plead beyond the period when the statute or rule requires answer, demurrer or plea will not enlarge the time for filing removal petition.¹⁴ But when a party is entitled to an extension of time under the State statutes or rules of court, as of right, he is not required by statute or rule, to plead or answer before that time, and hence it enlarges his time to file a removal petition.¹⁵ A stipulation extending time to plead does not enlarge the time within which the law or court rule requires answer or plea, and therefore not the time for removal.¹⁶ Some authorities go further than the foregoing propositions and hold that discretionary orders extending time to plead, based upon a standing rule or statute, extend also the time for removal.¹⁷ But it does not seem that a rule or statute providing for the discretionary exercise of power to enlarge the time to plead, a power which all courts possess regardless of statute or rule, is contemplated by Congress in the above provision. It seems safer to assume that Congress had in mind the statute or rule requiring answer or plea and not a statute or rule existing side by side with the requirement permitting the courts to excuse compliance therewith.

[l] — by amendment of pleadings or change of parties.

Amendment of a declaration or complaint which does not state a new

⁹See *Dancel v. Goodyear S. M. Co.* 106 Fed. 551.

¹⁰*Chicago v. Hutchinson*, 15 Fed. 129; *Case v. Olney*, 106 Fed. 434. A rule of court in Indiana fixes the time for pleading after the appearance day: See *Amsden v. Norwich*, etc. Soc. 44 Fed. 515; *Daugherty v. W. U. T. Co.* 61 Fed. 138; *Conner v. Skagit*, 45 Fed. 802, 804.

¹¹*Baumgardner v. Bono F. Co.* 58 Fed. 2.

¹⁴*Railroad Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Pullman P. C. Co. v. Speck*, 113 U. S. 88, 28 L. ed. 925, 5 Sup. Ct. Rep. 374; *Austin v. Gagan*, 39 Fed. 627, 5 L.R.A. 477; *Spangler v. Atchison*, etc. R. R. 42 Fed. 306; *Dixon v. W. U. T. Co.* 38 Fed. 377; *Velie v. Mfg. Co.* 40 Fed. 546; *Brigham v. Thompson Co.* 55 Fed. 883; *Fidelity Co. v. Newport Co.* 70 Fed. 406; *Fox v. Southern Ry.* 80 Fed. 948; *Frink v. Blackington Co.* 80 Fed. 306. But see *Wilcox v. Phoenix Ins. Co.* 60

Fed. 932; *Peoples Bank v. Aetna Ins. Co.* 53 Fed. 161; *Simonson v. Jordan*, 30 Fed. 721; *Rycroft v. Green*, 49 Fed. 177; *Chiatovich v. Hanchett*, 78 Fed. 195.

¹⁵See *Schipper v. Consumer Co.* 72 Fed. 803; *Rycroft v. Green*, 49 Fed. 177. See *Wilcox v. Phoenix Ins. Co.* 60 Fed. 930, which goes further than the text.

¹⁶*Ruby Co. v. Hunter*, 60 Fed. 305; *Tracy v. Morel*, 88 Fed. 802; *Fox v. So. Ry. Co.* 80 Fed. 945; *Price v. Lehigh R. R.* 65 Fed. 825; *Martin v. Carter*, 48 Fed. 596.

¹⁷*Simonson v. Jordan*, 30 Fed. 721; *Dwyer v. Peshall*, 32 Fed. 497; *Hurd v. Gere*, 38 Fed. 537; *Rycroft v. Green*, 49 Fed. 177; *Wilcox v. Phoenix Ins. Co.* 60 Fed. 932; *Peoples' Bank v. Aetna Ins. Co.* 53 Fed. 161; *Chiatovich v. Hanchett*, 78 Fed. 195. Such is the settled rule in the second circuit: *Lord v. Lehigh R. R.* 104 Fed. 929 and cases cited.

cause of action will not revive a right of removal;²⁰ although it may enlarge the time to remove, if it enlarges the time to plead.¹ But if a new cause of action is stated by amendment it has been held that defendant may thereafter seek removal.² Where the amendment by enlarging the amount in dispute or change in substance, first presents a case that is removable, a petition for removal may be filed promptly thereafter.³ So where discontinuance is entered against a party whose presence was a mere device to bar Federal jurisdiction, removal may be had thereafter.⁴ If a change in parties in effect marks the institution of a new suit, they may have time for removal.⁵ The clause requiring petition for removal at or before the time for answer cannot have a literal application where the circumstances giving the right to removal only arise thereafter.⁶ If plaintiff joins resident defendants, and, after the statutory time for removal has expired, dismisses such resident defendants, the nonresident defendant is entitled to remove, and plaintiff is estopped to set up the expiration of time therefore.⁷

[m] — waiver of objection that petition too late.

It is settled that the provision fixing the time for filing the petition is not jurisdictional, but is modal and formal.¹¹ It may be waived by failure to make seasonable objection that a petition is filed too late.¹² Failure to move for remand is a waiver of the objection;¹³ and a party may otherwise

²⁰Kaitel v. Wylie, 38 Fed. 865; Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471; Painter v. New M. Co. 98 Fed. 544.

¹Martin v. Carter, 48 Fed. 596. See Cramer v. Mack, 12 Fed. 803, 20 Blatchf. 479.

²Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471; Evans v. Dillingham, 43 Fed. 177. But compare Edrington v. Jefferson, 111 U. S. 775, 28 L. ed. 594, 4 Sup. Ct. Rep. 683; Phoenix Ins. Co. v. Walrath, 117 U. S. 366, 29 L. ed. 924, 6 Sup. Ct. Rep. 768.

³Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471; Huskins v. Cincinnati, etc. R. R. 37 Fed. 504, 3 L.R.A. 545; Yarde v. Baltimore R. R. 57 Fed. 913; Cookerly v. Great N. R. R. 70 Fed. 277; Speekart v. German Nat. Bank, 85 Fed. 12; Bailey v. Mosher, 95 Fed. 223, holding first petition became effective on amendment afterwards making out a removable case. Fogarty v. S. P. R. R. 121 Fed. 941; Tremper v. Schwabacher, 84 Fed. 416.

⁴Powers v. Chesapeake Ry. 169 U. S. 102, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

⁵Shirley v. Waco. T. P. 13 Fed. 705, 4 Woods, 411. See American Nat. Bank v. N. B. Co. 70 Fed. 422.

⁶Powers v. Chesapeake, etc. Ry. 169 U. S. 100, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; Remington v. Central Pac. R. R. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Barber v. Boston, etc. R. Co. 145 Fed. 52.

⁷Powers v. Chesapeake & O. Ry. Co. 169 U. S. 92, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; Hukill v. Chesapeake & O. Ry. Co. 65 Fed. 138; Powers v. Chesapeake & O. Ry. Co. 65 Fed. 129; Cookerly v. Great Northern Ry. Co. 70 Fed. 277.

¹¹Powers v. Chesapeake, etc. Ry. 169 U. S. 99, 100, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

¹²Ayers v. Watson, 113 U. S. 594, 597, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641; Martin v. Baltimore, etc. R. R. 151 U. S. 689, 38 L. ed. 317, 14 Sup. Ct. Rep. 539; Tod v. R. R. Co. 65 Fed. 145, 12 C. C. A. 521; Collins v. Stott, 76 Fed. 613; Baltimore, etc. R. R. v. Ford, 35 Fed. 173.

¹³Guarantee Co. v. Hanway, 104 Fed. 369.

estop himself from the right to object.¹⁴ It is too late to object first on appeal.¹⁵ The removing party cannot object that his proceedings were too late.¹⁶

[n] To what circuit court cause should be taken.

The circuit court for the district within the territorial limits of which the suit is pending is the proper court to which to remove a cause;¹⁸ regardless of where it originated.¹⁹ In many instances Federal judicial districts are divided into divisions and in such cases there are sometimes special statutory provisions respecting the proper procedure on removal, of which the practitioner should take note.²⁰

§ 1137. Removal bond conditioned to enter record, etc.

[The party seeking removal in addition to his removal petition] shall make and file therewith a bond,^{[a]-[d]} with good and sufficient surety,^[f] for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.^[e]

Part of § 3, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, 24 Stat. 552 as corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433; U. S. Comp. Stat. 1901, p. 510.

[a] History of provision respecting removal bond.

This portion of the act of 1875 was not altered by the amendments of 1887 and 1888. It superseded a provision in R. S. § 639, which differed from the above in specifying process, pleadings, depositions, etc., instead of merely requiring a copy of "the record," and in the absence of any provision that the bond cover the costs that might be awarded on remand. R. S. § 639 was based upon earlier acts of 1866, 1867 and 1879.⁴

¹⁴*Powers v. Chesapeake, etc. Ry.* 13 Blatchf. 170, Fed. Cas. No. 7,902. 65 Fed. 129.

¹⁵*Knight v. Internat. Ry.* 61 Fed. Fed. 933; *Hyde v. Victoria L. Co.* 87, 9 C. C. A. 376; *Newman v.* 125 Fed. 970.

¹⁶*Hess v. Reynolds*, 113 U. S. 81. 129; *Martin v. Baltimore, etc. R. R.* 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

¹⁷151 U. S. 673, 38 L. ed. 317, 14 Sup. Ct. Rep. 539.

¹⁸*Ayers v. Watson*, 113 U. S. 599, § 12, 1 Stat. 79; act July 27, c. 288. 28 L. ed. 1093; 5 Sup. Ct. Rep. 641; 14 Stat. 306; act Mar. 12, 1867, c. Connell v. Smiley, 156 U. S. 335, 39 196, 14 Stat. 558.

¹⁹L. ed. 444, 15 Sup. Ct. Rep. 354.

²⁰*Knowlton v. Congress, etc. Co.*

[b] Necessity for bond.

As it is filing of proper petition and bond that terminates the State court's jurisdiction,⁵ it has been held as necessary to a divestiture of that jurisdiction that the bond filed comply with the statute, as that the petition show a removable cause.⁶ Certainly there must be some bond and to that extent it is jurisdictional,⁷ yet it would seem that a bond not in statutory form might be rendered sufficient to satisfy jurisdictional requirements by the State court's acceptance thereof. While it is perhaps not indispensable that petition and bond be filed together, neither is effective until supplemented by the other,⁸ and both must be within the prescribed time.⁹

[c] Form and requisites of bond.

While the act prescribes the obligation upon the bond it does not require that it be a penal bond in any particular sum, so that a bond not penal in form, but merely to pay an indefinite amount would apparently be good;¹² and not a ground for remand where the cause was in fact removable and the removal already an accomplished fact.¹³ The practice, however, seems to be to furnish a bond penal in form with a penalty large enough to cover any costs that might accrue.¹⁴ Certainly if the State court accepts a bond with the necessary conditions, as sufficient, whether penal or not, it should not be ground for remanding a removable cause that has otherwise been properly removed.¹⁵ But if a bond is penal in form and the amount is left blank there is no liability and no bond.¹⁶

The statutory requirement that the removing party "make" the bond is satisfied by offering a good bond to the court and it is not necessary that the party sign it or appear therein as principal.¹⁷ No seal upon the bond

⁵See ante, § 1136 [d].

⁶McMurdy v. Conn. Ins. Co. 6 Ins. L. J. 666 Fed. Cas. No. 8,903; Torrey v. Grant Wks. 14 Blatchf. 269, Fed. Cas. No. 14,105; Webber v. Bishop, 13 Fed. 49; Sheldrick v. Cockroft, 27 Fed. 579; Shedd v. Fuller, 36 Fed. 609. But some authorities do not deem the bond jurisdictional; Beede v. Cheeney, 5 Fed. 388; Deford v. Mahaffy, 13 Fed. 481; MacNaughton v. R. R. 19 Fed. 883 (although holding the petition jurisdictional and not amendable).

⁷The mere filing of petition is not removal: Gregory v. Hartley, 113 U. S. 745, 28 L. ed. 1150, 5 Sup. Ct. Rep. 743; Crehore v. Ohio, etc. Ry. 131 U. S. 244, 33 L. ed. 144, 9 Sup. Ct. Rep. 692.

⁸McMurdy v. Conn. Ins. Co. 6 Ins. L. J. 666, Fed. Cas. No. 8,903. Maine v. Gilman, 11 Fed. 214.

⁹Austin v. Gagan, 39 Fed. 626, 628, 5 L.R.A. 476.

¹²Burdick v. Hale, 7 Biss. 96, Fed. Cas. No. 2,147; Commonwealth v. Louisville B. Co. 42 Fed. 241.

¹³Johnson v. F. C. Austin Co. 76 Fed. 616.

¹⁴Com. v. Louisville B. Co. 42 Fed. 241; Johnson v. F. C. Austin Co. 76 Fed. 616.

¹⁵See Van Allen v. R. R. Co. 3 Fed. 545, 1 McCrary, 598. See Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452; Johnson v. F. C. Austin Co. 76 Fed. 616.

¹⁶Burdick v. Hale, 7 Biss. 96, Fed. Cas. No. 2,147; Austin v. Gagan, 39 Fed. 628, 5 L.R.A. 476.

¹⁷Stevens v. Richardson, 9 Fed. 195, 20 Blatchf. 53; Public G. etc. Co. v. W. U. T. Co. 16 Fed. 289, 11 Biss. 568; Peoples Bank v. Ins. Co. 53 Fed. 161, 163.

is required by this statute and the absence of seal cannot invalidate it.¹⁸ It is improper for a removing party to appear as surety on the bond.¹⁹

[d] Amendment of bond and waiver of defects.

As in the case of petition,² amendment of the bond is permissible in the Federal court, after the time for removing the cause has expired. The authorities differ as to the nature of the amendments permissible. Those which regard the giving of a bond that complies with statutory requirements, as jurisdictional, will only permit amendment in minor matters, as, to show the proper district.³ Or will disregard any irregularities which they would permit to be amended,⁴ holding eighteen months delay in objecting to irregularities a waiver. Upon the other hand these authorities will not permit amendment where as given, the bond fails to contain the statutory condition as to costs;⁵ or fails to contain a penal sum although penal in form.⁶ Other authorities take the view that if the petition be regular and the case is removable and has been removed, and the record filed, all defects in the bond are immaterial;⁷ and that a failure to condition the bond to cover costs is immaterial and may be amended in the Federal court;⁸ or a failure to execute a bond to the proper person.⁹ Where the State court has accepted a bond and ordered removal, or otherwise recognized the regularity of the removal proceedings so as to preclude the possibility of actual conflict of jurisdiction and decision, there is much to be said in favor of permitting liberality in the amendment of a defective bond.¹⁰

[e] Condition specified by the bond.

The condition as to payment of costs must be included in every instance;¹¹ and as to filing the record;¹² but the clause respecting appear-

¹⁸Loop v. Winters, 115 Fed. 362.

¹⁹Chambers v. McDougal, 42 Fed. 694, 697.

²Ante, § 1136 [h].

³Hodge v. Chicago, etc. Ry. 121 Fed. 48, 57 C. C. A. 388.

⁴Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791. See Chambers v. McDougal, 42 Fed. 694; Herve v. Ry. Co. 3 Fed. 709, holding eighteen months' delay in objecting to irregularities a waiver.

⁵Torrey v. Grant L. Wks. 14 Blatchf. 269, Fed. Cas. No. 14,105; McMurdy v. Life Ins. Co. 4 Wkl. N. Cas. 18, Fed. Cas. No. 8,903; Webber v. Bishop, 13 Fed. 49; Sheldrick v. Cockroft, 27 Fed. 579.

⁶Burdick v. Hale, 7 Biss. 96, Fed. Cas. No. 2,147.

⁷Beede v. Cheeney, 5 Fed. 388; Deford v. Mahaffy, 13 Fed. 481; Harris

v. Delaware R. R. 18 Fed. 833; MacNaughton v. S. P. R. R. 19 Fed. 883; Chambers v. McDougal, 42 Fed. 694.

⁸Deford v. Mahaffy, 13 Fed. 481; Coburn v. Cattle Co. 25 Fed. 794.

⁹Harris v. Delaware R. R. 18 Fed. 833.

¹⁰See MacNaughton v. S. P. R. R. 19 Fed. 884; Johnson v. F. C. Austin Co. 76 Fed. 616; VanAllen v. P. R. Co. 3 Fed. 545, 1 McCrary, 598; Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452.

¹¹McMurdy v. Conn. Ins. Co. 6 Ins. L. J. 666, Fed. Cas. No. 8,903; Torrey v. Grant L. Wks. 14 Blatchf. 269, Fed. Cas. No. 14,105; Webber v. Bishop 13 Fed. 49; Sheldrick v. Cockroft, 27 Fed. 579.

¹²See Clippinger v. Missouri L. Ins. Co. 26 Ohio St. 404.

ance and entering special bail need appear only in those cases where special bail has in fact been required.¹⁵ So under the law of Pennsylvania, in an action of foreign attachment the bond need not be conditioned for the entering of such bail.¹⁶ If defendant is held to bail the amount of the bond must equal the bail. But an attachment bond is not "special bail."¹⁷ The sureties on the bail bond given in the State court are discharged by the removal.¹⁸

[f] Sufficiency, and justification of sureties.

The State court may investigate the value of the sureties,¹ and judge of their sufficiency.² It must determine whether the surety is "good and sufficient," may determine the amount, and whether it should be joint or joint and several.³ The State court may require the sureties to justify.⁴ But the sureties are not bound to justify until a rule to do so is laid upon them.⁵ The absence of any acknowledgment or proof of the execution of the bond is a matter of practice for the State court to pass upon.⁶ Where the bond presented is apparently ample, the State court cannot arbitrarily refuse to receive it, or refuse to remove without giving an opportunity to correct it, and make it ample.⁷ It cannot reject the security without assigning a cause;⁸ nor can it refuse to accept it, except on the ground of insufficiency.⁹ If all the requisites exist, the State court must accept the surety and proceed no farther.¹⁰ The surety is not bound by the subsequent adjudication against the principal in a State court. If there is one good and sufficient surety the fact that the other is an attorney not competent to act as surety gives the State court no right to retain jurisdiction.¹¹

¹⁵Burck v. Taylor, 39 Fed. 581, 584. See Cooke v. Seligman, 7 Fed. 269, 17 Blatchf. 452, where provision of bond that defendant "do or cause to be done such other and appropriate acts" as by law were required, was held the equivalent.

¹⁶Preston v. McNeil L. Co. 143 Fed. 555. ¹⁷Jones v. Seward, 17 Abb. Pr. 377.

¹⁸Ramsay v. Coolbaugh, 13 Iowa, 164; Davis v. South Carolina, 107 U. S. 601, 27 L. ed. 574, 2 Sup. Ct. Rep. 636.

¹Orosco v. Gagliardo, 22 Cal. 83; Suydam v. Smith, 1 Denio, 263.

²Fitz v. Hayden, 4 Martin N. S. 653. ³Mix v. Andes Ins. Co. 74 N. Y. 53, 30 Am. Rep. 260.

⁴Weed Sew. Mach. Co. v. Smith, 71 Ill. 204; Darst v. Bates, 51 Ill. 439; Herndon v. Aetna Ins. Co. 107 N. C. 195, 12 S. E. 240, 10 L.R.A. 53.

⁵Fed. Proc.—67. ⁶Howard v. Southern R. R. 122 N. C. 945, 29 S. E. 778; Taylor v. Shew, 54 N. Y. 77.

⁷Empire Trans. Co. v. Richards, 88 Ill. 404; Cleveland etc. R. R. v. Monaghan, 140 Ill. 484, 30 N. E. 869; Miller v. Finn, 1 Neb. 254.

⁸Cooke v. Seligman, 7 Fed. 263, 17 Blatchf. 452. ⁹Taylor v. Shew, 54 N. Y. 75.

¹⁰Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355; Taylor v. Shew, 54 N. Y. 75; Mix v. Andes Ins. Co. 74 N. Y. 53, 30 Am. Rep. 260.

¹¹Yulee v. Vose, 99 U. S. 539, 25 L. ed. 355, S. C. 64 N. Y. 449; Fisk v. Union Pac. R. Co. 6 Blatchf. 362, Fed. Cas. No. 4,827; Mix v. Andes Ins. Co. 74 N. Y. 53, 30 Am. Rep. 260.

¹²De Camp v. N. J. L. M. Ins. Co. 2 Sweeney, 481. ¹³Removal Cases, 100 U. S. 457, 25 L. ed. 599. See Chambers v. McDougal, 42 Fed. 694.

§ 1138. State court should receive bond and proceed no further.

It shall then be the duty of the State court^[b] to accept said petition and bond,^[c]^[d] and proceed no further in such suit;^[e]^[f] and the said copy being entered as aforesaid in the said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.

Part of § 3, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended Mar. 3, 1887, c. 373, 24 Stat. 552 as corrected Aug. 13, 1888, c. 966, § 1, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 510.

[a] History of statutory provision.

As originally enacted in 1875 this portion of the section contained also the proviso "and any bail that may have been originally taken shall be discharged." The act of 1875 superseded a clause of R. S. § 639 providing that "It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged."

[b] Scope of inquiry open to State court.

The State court can only inquire whether as a matter of law on the face of the record, including the declaration or complaint petition and bond, there exists a right of removal.¹⁶ It has a right to satisfy itself as to the sufficiency of the security offered;¹⁷ and that the petition is filed in time.¹⁸ But averments of the petition must be taken as true,¹⁹ and it has no discretion to refuse acceptance of a bond with good and sufficient surety.²⁰ In other words while the State court as well as the circuit court may pass upon the questions of law,¹ all questions of fact are to be decided by the circuit court.² The State court cannot deny a right of removal upon the pretended ground of vagueness in the petition.³

[c] Presentation and acceptance of petition and bond.

It is the filing of petition and bond that is jurisdictional and required to

¹⁶Carson v. Hyatt, 118 U. S. 287, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Burlington. etc. Ry. v. Dunn, 122 U. S. 515, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262.

¹⁷Penn Co. v. Bender, 148 U. S. 260, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

¹⁸Kansas, etc. R. R. v. Daughtry, 138 U. S. 303, 34 L. ed. 963, 11 Sup. Ct. Rep. 306.

¹⁹Southern Ry. v. Hudgins, 107 Ga. 337, 33 S. E. 443.

²⁰Removal Cases, 100 U. S. 472, 25 L. ed. 593.

¹Walker v. O'Neill, 38 Fed. 374; Springer v. Howes, 69 Fed. 849. But see Beadleston v. Harpending, 32 Fed. 644.

²Kansas City R. R. v. Daughtry, 138 U. S. 303, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; Stone v. South Carolina, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Postal Co. v. So. Ry. 88 Fed. 805; Dow v. Bradstreet Co. 46 Fed. 828.

³Marshall v. Holmes, 141 U. S. 601, 35 L. ed. 870, 12 Sup. Ct. Rep. 62.

be within the statutory time.⁶ The action of the State court in accepting them may be later.⁷ Acceptance is not in any sense a condition precedent to the transfer of jurisdiction. As it is made the State court's duty to accept proper petition and bond, any formal acceptance is not prerequisite to the vesting of the circuit court's jurisdiction;⁸ and refusal to accept does not prevent its jurisdiction from terminating.⁹ Refusal to accept a bond that is in fact good and sufficient will not prevent the ousting of the State court's jurisdiction.¹⁰ However it is correct practice and in accordance with the rules of comity to obtain the State court's formal acceptance of the petition and bond.¹¹ The requirement of the act that the State court accept the petition and bond seems to imply that the party is to present them to the court besides filing them.¹² The court is not to be deprived of the opportunity to pass upon the sufficiency of the petition and bond, by leaving them with the clerk and taking a transcript of the record forthwith.¹³ By comity at least, the State court or the judge in vacation,¹⁴ should be given opportunity to pass upon the petition and bond.¹⁵ Its acceptance and order of removal thereon, relate back to the filing of petition and bond.¹⁶ Moreover there are advantages in formally presenting the petition and bond and obtaining their acceptance and an order of removal. Defects may be pointed out which the party can remedy by amendments; and the fact that the State court has formally accepted the petition and bond, places the removing party in a better position to enjoin the State court's proceedings,¹⁷ or to obtain amendment in case defects are made the basis of objection in the circuit court.¹⁸ On the other hand if the State court decides the question of law involved adversely and declines to permit removal, the parties chance of getting an opposite decision in the circuit court is impaired.¹⁹ It is sufficient presentation if the attention of the

⁶Ante, § 1136.

⁷Burck v. Taylor, 39 Fed. 581; Noble v. Mass. Ben. Ass. 48 Fed. 337. See Waters v. Cent. T. Co. 126 Fed. 469.

⁸Brigham v. Thompson L. Co. 55 Fed. 881; State v. Coosaw M. Co. 45 Fed. 804, 811; Brown v. Murray etc. & Co. 43 Fed. 614; Miller v. Tobin, 18 Fed. 609, 9 Sawy. 401. But compare Fox v. So. Ry. Co. 80 Fed. 948; La Page v. Day, 74 Fed. 977; Kinne v. Lant, 68 Fed. 438.

⁹Shedd v. Fuller, 36 Fed. 609.

¹⁰Removal Cases, 100 U. S. 472, 25 L. ed. 599; Noble v. Mass. Ben. Assn. 48 Fed. 337.

¹¹Brown v. Murray Nelson & Co. 43 Fed. 616; Noble v. Mass. Ben. Assn. 48 Fed. 337; Fox v. So. Ry. Co. 80 Fed. 948; Osgood v. Chicago, etc. Ry. Co. 6 Biss. 348, Fed. Cas. No. 10,604.

¹²See *Scoutt v. Keck*, 73 Fed. 901, 907, 20 C. C. A. 103; *Coker v. Monaghan Mills*, 110 Fed. 806.

¹³Hall v. Chattanooga, 48 Fed. 601; Fox v. So. Ry. Co. 80 Fed. 948; La Page v. Day, 74 Fed. 977; Brown v. Murray Nelson, 43 Fed. 614, 616. ¹⁴Shedd v. Fuller, 36 Fed. 609; Roberts v. R. R. 45 Fed. 433.

¹⁵Probst v. Cowen, 91 Fed. 931; State v. Coosaw M. Co. 45 Fed. 811, 812; Hall v. Chattanooga, 48 Fed. 600.

¹⁶Miller v. Tobin, 18 Fed. 613, 9 Sawy. 401.

¹⁷Coker v. Monaghan Mills, 110 Fed. 806.

¹⁸See ante, § 113 [d].

¹⁹See *Springer v. Howes*, 69 Fed. 851.

State court or judge is drawn to the petition and bond specifically though not formally.²⁰

[d] Necessity for order of removal.

No formal order for the removal of the cause is necessary;⁴ and a case is removed though an order is not passed.⁵ Yet it is usual to obtain an order accepting petition and bond and directing removal.⁶ It is a convenient mode of manifesting the State court's action in the premises, and relates back to the filing of the petition and bond.⁷

[e] State jurisdiction terminated by filing proper petition and bond.

No adjudication by the State court, of the sufficiency of the petition and bond are necessary.¹⁰ If they are in fact sufficient and make out a removable case and are filed within the statutory time, the jurisdiction of the State court thereupon ceases and the cause is removed notwithstanding the State court's refusal to allow it.¹¹ The State court is without jurisdiction to proceed;¹² even though the record is not yet filed in the circuit court.¹³ Nor will failure to file the record in the circuit court in due time, restore the jurisdiction.¹⁴ An order by the State court granting the removal is unnecessary to terminate the State court's jurisdiction;¹⁵ and if a removable case has been duly made to appear by proceedings taken in due conformity to the Federal statutes, the circuit court's jurisdiction has attached and no order by the State court in the premises can effect it.¹⁶

It is equally true, however, that the State court is not bound to re-

²⁰See *Probst v. Cowen*, 91 Fed. 931; *State v. Coosaw M. Co.* 45 Fed. 811, 812; *Chambers v. McDougal*, 42 Fed. 696; *Monroe v. Williamson*, 81 Fed. 983.

⁴*Loop v. Winters*, 115 Fed. 362; *LaPage v. Day*, 74 Fed. 977; *Eisenmann v. Delemar's Nev. G. M. Co.* 87 Fed. 248; *Lund v. Chic. R. I. & P. R. Co.* 78 Fed. 385; *Wilson v. W. U. Tel. Co.* 34 Fed. 561; *Osgood v. C. D. & V. R. Co.* 6 Biss. 330, Fed. Cas. No. 10,604; *Connor v. Scott*, 4 Dill. 242, Fed. Cas. No. 3,119; *Lalor v. Dunning*, 56 How. Pr. 209; *Hatch v. Chicago R. I. & P. R. Co.* 6 Blatchf. 105, Fed. Cas. No. 6,204.

⁵*Commercial Sav. Bank v. Corbett*, 5 Sawy. 172, Fed. Cas. No. 3,057.

⁶*Merchants N. Bank v. Thompson*, 4 Fed. 876; *Cooke v. Seligman*, 7 Fed. 263, 17 Blatchf. 452. See *supra*, note [].

⁷*Miller v. Tobin*, 18 Fed. 613, 9 Sawy. 401.

¹⁰*Penn. Co. v. Bender*, 148 U. S. 260, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

¹¹*Insurance Co. v. Morse*, 20 Wall. 454, 22 L. ed. 365; *Crehore v. Ohio Ry.* 131 U. S. 243, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Marshall v. Holmes*, 141 U. S. 595, 35 L. ed. 872, 12 Sup. Ct. Rep. 63; *State v. Coosaw M. Co.* 45 Fed. 804; *Monroe v. Williamson*, 81 Fed. 977; *Boatman Bank v. Fritzlen*, 135 Fed. 650, (C. C. A.)

¹²*Railroad Co. v. Mississippi*, 102 U. S. 136, 26 L. ed. 96; *State v. Coosaw M. Co.* 45 Fed. 811; *Monroe v. Williamson*, 81 Fed. 985, 987.

¹³*Railroad v. Koontz*, 104 U. S. 14, 26 L. ed. 643.

¹⁴*Steamship Co. v. Tugman*, 106 U. S. 122, 27 L. ed. 87, 1 Sup. Ct. Rep. 58.

¹⁵*Brown v. Murray* Co. 43 Fed. 615; *Noble v. Mass. B. Assn.* 48 Fed. 338; *Loop v. Winters*, 115 Fed. 365. But it is proper, *Wilson v. W. U. T. Co.* 34 Fed. 561, *supra* note [d].

¹⁶*Brigham v. Thompson L. Co.* 55 Fed. 881.

linquish its jurisdiction until a removable case is made to appear upon the face of the record.¹⁷ If no such case is made out the State court's jurisdiction is never ousted, and the Federal jurisdiction never properly attaches.¹⁸ It seems also that a party may waive a removal to which the filing of petition and bond technically entitle him, by failing to call them to the court's attention and proceeding further in the State court.¹⁹

[f] Duty of State court to proceed no further.

When the State court's jurisdiction has been terminated by filing of petition and bond it has no power to permit plaintiff to amend so as to defeat Federal jurisdiction, as, by making a dispute below the jurisdictional amount.² Nor has it power to hear a plea to the jurisdiction filed at the same time with petition and bond;³ nor power to grant a nonsuit,⁴ or dismissal.⁵ It cannot proceed again in the cause until the jurisdiction is in some way restored,⁶ as by remand on order of the Federal court.⁷ However, the parties cannot have an order of remand of a properly removed case, by consent;⁸ although State court's have permitted a defendant who has filed petition and bond to withdraw them and proceed in the State court.⁹ The removal of a prosecution under one indictment, to the Federal court will not oust the State court of jurisdiction to proceed on other indictments.¹⁰ After judgment of dismissal in the Federal court there is no Federal jurisdictional reason why the State court should not entertain a new action.¹¹

- ¹⁷*Amory v. Amory*, 95 U. S. 187, 24 L. ed. 428; *Yulee v. Vose*, 99 U. S. 545, 25 L. ed. 355; *Removal Cases*, 100 U. S. 474, 25 L. ed. 599; *Crehore v. Ohio Ry.* 131 U. S. 243, 33 L. ed. 144, 9 Sup. Ct. Rep. 692.
- ¹⁸*Young v. Parker*, 132 U. S. 271, 33 L. ed. 352, 10 Sup. Ct. Rep. 75; *Crehore v. Ohio Ry.* 131 U. S. 244, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Johnson v. Wells Fargo Co.* 91 Fed. 3.
- ¹⁹*See Kinne v. Lant*, 68 Fed. 438; *Home Ins. Co. v. Curtis*, 32 Mich. 403; *Texas, etc. R. R. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; *Roberts v. Chicago R. R.* 48 Minn. 521, 51 N. W. 478. *Contra*, *Merriam v. Dunbar*, 11 Neb. 208, 7 N. W. 443. But asking extension of time to plead while court is considering removal petition is no waiver. *Waters v. Central T. Co.* 126 Fed. 469.
- ²*Kanouse v. Martin*, 15 How. 208, 14 L. ed. 660; *Wellman v. Howland Works*. 19 Fed. 52; *Probst v. Cowen*, 91 Fed. 929; *Clarkson v. Manson*, 4 Fed. 262, 18 Blatchf. 443; *Stephens v. St. Louis, etc. R. R.* 47 Fed. 530, 14 L. R. A. 184; *Insurance Co. v. Delaware Co.* 50 Fed. 257.
- ³*Goldey v. Morning News*, 156 U. S. 524, 39 L. ed. 520, 15 Sup. Ct. Rep. 559.
- ⁴*Shepherd v. Bradstreet Co.* 65 Fed. 142.
- ⁵*Mahoney M. Co. v. Bennett*, 4 Sawy. 291. Fed. Cas. No. 8,968.
- ⁶*Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.
- ⁷*Turner v. Farmers L. & T. Co.* 106 U. S. 555, 27 L. ed. 273, 1 Sup. Ct. Rep. 519; *Birdseye v. Shaeffer*, 37 Fed. 821.
- ⁸*Lawton v. Blitch*, 30 Fed. 641. But see *Farmers L. & T. Co. v. Chicago, etc.*, R. R. 9 Biss. 133, Fed. Cas. No. 4,665.
- ⁹*Wadleigh v. Standard L. Co.* 76 Wis. 441, 45 N. W. 109; *Farmers L. & T. Co. v. Chicago, etc. R. R.* 9 Biss. 133, Fed. Cas. No. 4,665.
- ¹⁰*Bush v. Commonwealth of Kentucky*, 107 U. S. 115, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.
- ¹¹*Gassman v. Jarvis*, 100 Fed. 140.

[g] Effect of decision of State court refusing removal and proceeding with cause.

A State court's decision against the right of removal is reviewable on error from the Supreme Court to the highest State court;¹³ the remedy is not by prohibition or contempt proceedings.¹⁴ Sometimes, however, the circuit court has issued injunction to restrain proceedings in the State court after removal.¹⁵ If the petition for removal in the record shows no ground for removal, the State court will be held justified in proceeding with the cause;¹⁶ and on writ of error, the Supreme Court will affirm the judgment of the highest State court.¹⁷

But if the record shows that the removal was improperly denied, the Supreme Court will hold that the party attempting removal was not bound to plead further in the State court;¹⁸ that if he took the precaution of so doing and failed to make further objections he did not waive his right to insist on the error;¹⁹ that he might file the record in the circuit court after getting a reversal of the State court's action on writ of error;²⁰ that the proceedings in the State court subsequent to the filing of his petition and bond were void and without jurisdiction;¹ although sanctioned by the highest State tribunals;² that the removing party might if the State laws permitted appeal from the order denying removal to the highest State courts.³ The State court's have held, however, that a party who does not perfect his removal by filing transcript may lose the right to object by waiver under some circumstances.⁴ On error to a State court where removal has been refused, the Supreme Court will confine its review to that question.⁵

The fact that both State and Federal courts have a right to pass upon the question of law raised by removal proceedings,⁶ has lead sometimes to insistence by each upon its own jurisdiction and the cause proceeding to

¹³Stone v. South Carolina, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Burlington, etc. Ry. v. Dunn, 122 U. S. 515, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262.

¹⁴Chesapeake, etc. Ry. v. White, 111 U. S. 137, 28 L. ed. 378, 4 Sup. Ct. Rep. 352.

¹⁵French v. Hay, 22 Wall. 252, 22 L. ed. 857; Abeel v. Culberson, 56 Fed. 333; Dietzsch v. Huidekoper, 103 U. S. 498, 26 L. ed. 497.

¹⁶Insurance Co. v. Pechner, 95 U. S. 185, 186, 24 L. ed. 427.

¹⁷Pennsylvania Co. v. Bender, 148 U. S. 260, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

¹⁸Kanouse v. Martin, 15 How. 209, 14 L. ed. 660.

¹⁹Railroad Co. v. Mississippi, 102 U. S. 141, 26 L. ed. 96; Kern v. Huidekoper, 103 U. S. 493, 26 L. ed. 354; Steamship Co. v. Tugman, 106 U. S. 362, 20 Blatchf. 39.

123, 27 L. ed. 87, 1 Sup. Ct. Rep. 58.

²⁰Railroad Co. v. Koontz, 104 U. S. 17, 26 L. ed. 643.

¹Strauder v. West V. 100 U. S. 312, 25 L. ed. 664; Virginia v. Rives, 100 U. S. 317, 25 L. ed. 667; Davis v. South Carolina, 107 U. S. 601, 27 L. ed. 574, 2 Sup. Ct. Rep. 636.

²Insurance Co. v. Dunn, 19 Wall. 224, 22 L. ed. 68.

³Kanouse v. Martin, 15 How. 210, 14 L. ed. 660.

⁴See Texas, etc. Ry. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; Home Ins. Co. v. Curtis, 32 Mich. 403; Roberts v. Chicago R. R. 48 Minn. 521, 51 N. W. 478.

⁵Murdock v. Memphis, 20 Wall. 626, 22 L. ed. 429.

⁶Walker v. O'Neill, 38 Fed. 374; Springer v. Howes, 69 Fed. 851; Traders' Bank v. Tallmadge, 9 Fed. 362, 20 Blatchf. 39.

judgment and appeal in both tribunals.⁷ It has been said that the circuit court should accept the decision by the State court that it has jurisdiction and order a remand;⁸ at least where the removing party invoked the State court's decision on the point by asking for a removal order.⁹

§ 1139. Copy of record and time for filing.

In all causes removable under this act,¹⁰ if the term of the circuit court to which the same is removable, then next to the holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf.

Part of § 7, act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 512.

[a] Necessity for filing transcript in time.

Prior to the act of 1875 there was no statutory exception respecting the time for filing a transcript of the record. It is settled that the circuit court's jurisdiction attaches immediately upon the filing of proper petition and bond, without their acceptance by the State court,¹¹ or order for removal,¹² and in advance of the filing of the transcript.¹³ Failure to file the transcript in due time does not oust the Federal jurisdiction.¹⁴ The circuit court has power to permit the transcript to be filed at a day subsequent to that upon which it is due, and will do so for good cause shown.¹⁵

⁷See Removal Cases, 100 U. S. 457, 25 L. ed. 601; *Missouri P. Ry. v. Fitzgerald*, 160 U. S. 582, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Home Ins. Co. v. Va. etc. Co.* 109 Fed. 689.

⁸*Beadleston v. Harpending*, 32 Fed. 644.

⁹*Springer v. Howes*, 69 Fed. 851.

¹⁰That is, all removable causes except against revenue officers, etc., under R. S. § 643 (see post, §§ 1145-1148); or for denial of civil rights under R. S. § 641 (see post, §§ 1149-1152); or for prejudice or local influence (see post, § 1143). The causes removable under the act are stated in an early chapter, ante, §§ 133-136.

¹¹Ante, § 1138 [c].

¹²Ante, § 1138 [d].

¹³*St. Paul, etc. R. R. v. McLean*, 108 U. S. 216, 27 L. ed. 703, 2 Sup. Ct. Rep. 498; *Railroad Co. v. Mis-*

issippi, 102 U. S. 136, 26 L. ed. 96; *Monroe v. Williamson*, 81 Fed. 985; *Steamship Co. v. Tugman*, 106 U. S. 122, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *St. Paul, etc. R. R. v. McLean*, 108 U. S. 216, 27 L. ed. 703, 2 Sup. Ct. Rep. 498.

¹⁴*Hamilton v. Fowler*, 83 Fed. 321; *Torrent v. Martin L. Co.* 37 Fed. 728; *Rowell v. Hill*, 28 Fed. 434; *Judge v. Anderson*, 19 Fed. 886; *Eisenmann v. Delemars*, 87 Fed. 250.

¹⁵*Baltimore v. R. v. Koontz*, 104 U. S. 16, 26 L. ed. 643; *Delbanco v. Singletarry*, 40 Fed. 177; *Pierce v. Corrigan*, 77 Fed. 657; *Eisenman v. Delemars*, 87 Fed. 250; *Lucker v. Phoenix Ins. Co.* 66 Fed. 162; *Burgunder v. Browne*, 59 Fed. 498; and *Hall v. Brooks*, 14 Fed. 113, 21 Blatchf. 167, where misunderstanding as to commencement of term.

regardless of the motive prompting the removal.¹⁶ It will, however, usually impose conditions,¹⁷ and refuse to allow filing of a belated transcript where there has been inexcusable laches.¹⁸ Its action is discretionary and will not ordinarily be disturbed.¹⁹ Liability upon the removal bond arises where the record is not duly filed.²⁰ If the State court has refused to sanction removal, the party is not obliged to file the transcript and proceed in the Federal court, but may first procure a reversal of the State court's action on appeal, and then file his transcript.¹ If the record is transmitted to the circuit court in time, the failure to move to docket, or to mark the transcript as filed, are immaterial.²

[b] Filing record before ensuing Federal term.

While the law does not require filing of the record until the ensuing Federal term, it is sometimes necessary to preserve the property in dispute or the rights of a litigant to make application to the judge of the court before that time, and in such a case the plaintiff as well as the defendant may then file a copy of the record.³ Preliminary injunction may be obtained at that stage of the case;⁵ or dissolved;⁶ or modified;⁷ or ex parte orders warranted by the law governing the case may be granted.⁸ In many cases a plaintiff has been permitted to file the transcript and move to remand, upon giving due notice to the defendant;⁹ and remand has been ordered, where the application prior to the beginning of the term, was for a

¹⁶Hall v. Brooks, 14 Fed. 113, 21 Blatchf. 167.

¹⁷Eisenmann v. Delemars, 87 Fed. 250; Pierce v. Corrigan, 77 Fed. 657. 658.

¹⁸Hatcher v. Wadley, 84 Fed. 914; Broadnox v. Eisner, 13 Blatchf. 366, Fed. Cas. No. 1,909; Bright v. R. R. 14 Blatchf. 214, Fed. Cas. No. 1,877, remanding for delay of one term; McGregor v. McGillis, 30 Fed. 390, remanding where record not filed for fifteen months. Some of these cases were prior to the controlling Supreme Court decisions.

¹⁹St. Paul R. R. v. McLean, 108 U. S. 217, 27 L. ed. 703, 2 Sup. Ct. Rep. 498; Eisenmann v. Delemars, 87 Fed. 250.

²⁰Kidder v. Featteau, 2 Fed. 616, 1 McCrary 323, as to damages on bond see Henry v. L. & N. R. R. 91 Ala. 585, 8 South. 343.

¹Railroad Co. v. Koontz, 104 U. S. 17, 26 L. ed. 643. Compare Broadnox v. Eisner, 13 Blatchf. 360, Fed. Cas. No. 1,909, an earlier decision at circuit.

²Glover v. Shepperd, 15 Fed. 834, 11 Biss 572.

⁴Hamilton v. Fowler, 83 Fed. 321; Mills v. Newell, 41 Fed. 529; Delbanco v. Singletary, 40 Fed. 177; Consol. T. Co. v. Guarantors Co. 78 Fed. 657; Thompson v. R. R. Co. 60 Fed. 773; Kansas, etc. R. R. v. Lumbar Co. 36 Fed. 9.

⁵Mahoney M. Co. v. Bennett, 4 Sawy. 291, Fed. Cas. No. 8,968; Commercial Bank v. Corbett, 5 Sawy. 172, Fed. Cas. No. 3,057.

⁶Texas R. R. v. Rust, 17 Fed. 275. 5 McCrary 348.

⁷Portland v. Oregonian R. R. 6 Fed. 321, 7 Sawy. 122.

⁸In re Newark, etc. Co. 110 Fed. 25.

⁹Anderson v. Appleton, 32 Fed. 855; State v. Corrigan, 139 Fed. 758; Delbanco v. Singletary, 40 Fed. 177; Mills v. Newell, 41 Fed. 529; Thompson v. Chicago, etc. R. R. 60 Fed. 773; Ryder v. Bateman, 93 Fed. 31; Hartford R. R. v. Montague, 94 Fed. 227 (holding it settled practice in second circuit); Frink v. Blackington, 80 Fed. 306. Contra, Kansas, etc. R. R. v. Interstate L. Co. 36 Fed. 9.

receiver.¹⁰ In some districts the rules permit either party as of course to file the record after the removal proceedings are perfected,¹¹ and give notice to the other party.¹²

But deposition taken prior to the filing of the record at the first of the next term has been excluded where no necessity for action in the interim appeared.¹³ Any proceedings which would amount to a disposition of the cause on the merits have also been discountenanced prior to the commencement of the term at which the law requires the record to be filed.¹⁴

[c] **Record and by whom filed.**

While it is the clerk's duty to certify to the copy of the record,¹⁷ it is the removing party's duty to file the record.¹⁸ Detached papers should be certified to.¹⁹ If the removing party fails to file the record in time, plaintiff may file it and move to remand the cause.²⁰ So also plaintiff may often, and in some districts always, file the record before the time fixed by law therefor.¹ While it is a copy of the record that the law requires, the original may be filed with the consent of the State court.² The removal petition is part of the record.³ Journal entries showing the disposition of motions made are also proper parts of the record⁴ as are also ancillary proceedings of garnishment in another State.⁵ If the record is incomplete, diminution may be suggested.⁶

§ 1140. Penalty for refusal by state court clerk to furnish copy.

If the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States, to which said action, or proceeding was removed, shall be punished by imprisonment not more

¹⁰Ryder v. Bateman, 93 Fed. 31.

¹¹See Delbanco v. Singletary, 40 Fed. 177.

¹²Chiatovich v. Hanchett, 78 Fed. 193.

¹³North A. T. Co. v. Howells, 121 Fed. 694.

¹⁴New O. R. R. v. Crescent C. Ry. 5 Fed. 160; In re Barnesville R. R. 4 Fed. 10, 2 McCrary 216.

¹⁷Mayo v. Dockery, 127 N. C. 1, 37 S. E. 62; Martin v. Kanouse, 1 Blatchf. 149, Fed. Cas. No. 9,162.

¹⁸Miller v. Wattier, 24 Fed. 49; Hatcher v. Wadley, 84 Fed. 913.

¹⁹Commercial, etc. Bank v. Cor-

bett, 5 Sawy. 172, Fed. Cas. No. 3,057. See Clark v. Delaware etc. Co. 11 R. I. 36 as to date of certificate.

²⁰McGregor v. McGillis, 30 Fed. 390.

¹Supra, note [b].

²Miller v. Wattier, 24 Fed. 49.

³Randall v. New E. etc. Co. 118 Fed. 782.

⁴Probst v. Cowen, 91 Fed. 931.

⁵Woodward L. Co. v. Vizard, 144 Fed. 982.

⁶Cook v. Whitney, 3 Woods, 715, Fed. Cas. No. 3,166; Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791; Probst v. Cowan, 91 Fed. 931.

than one year, or by fine not exceeding \$1,000, or both, in the discretion of the court.

Part of § 7 act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 512.

This penal provision was first introduced into the removal laws by the act of 1875, *supra*. A clerk refusing a demand for a copy of the record may be proceeded against both civilly and criminally.⁹

§ 1141. Circuit court may certiorari State court for copy of record.

The circuit court to which any cause, shall be removable under this act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law.

Part of § 7 act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 512.

Prior to the act of 1875 no provision was made either for punishing the State court clerk criminally,¹⁰ or for the issuance of certiorari. The court permitted the parties to supply copies of the record and proceedings.¹¹ It is unnecessary under the above provision to issue certiorari if the record is actually before the circuit court.¹² Nor will it issue if it appears that the cause is not removable;¹³ or if it appears that the omission in the record is of a paper withdrawn from the file by stipulation.¹⁴ A defect or omission in the transcript may be cured by certiorari,¹⁵ as, where a copy of the record is incomplete.¹⁶ The object of the writ is to require the State court to certify the copy of the record.¹⁷ The clerk's authentication is sufficient without the certificate of the judge;¹⁸ and the authentication may be on separate sheets of paper.¹⁹ A return by the State court that an ap-

⁹Miller v. Wattier, 24 Fed. 49.

¹⁰Ante, § 1140.

¹¹Akerly v. Vilas, 2 Biss. 110, Fed. Cas. No. 119.

¹²Scott v. Clinton, etc. R. R. 6 Biss. 537, Fed. Cas. No. 12, 527.

¹³Ex parte Wells, 3 Woods, 128, Fed. Cas. No. 17,386; State v. Chicago, etc. R. R. 6 Biss. 107, Fed. Cas. No. 7,006; In re Helena, etc. Co. 48 Fed. 609.

¹⁴Wilkinson v. Delaware R. R. 23 Fed. 562.

¹⁵Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791; Cook v. 3,057.

Whitney, 3 Woods, 715, Fed. Cas. No. 3,166.

¹⁶Commercial & Sav. Bank v. Corbett, 5 Sawy. 172, Fed. Cas. No. 3,057; Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791; Cook v. Whitney, 3 Woods, 715, Fed. Cas. No. 3,166; Probst v. Cowen, 91 Fed. 931.

¹⁷Broadnax v. Eisner, 13 Blatchf. 366, Fed. Cas. No. 1,909.

¹⁸Osgood v. Railroad Co. 6 Biss. 330, Fed. Cas. No. 10,604.

¹⁹Commercial & Sav. Bank v. Corbett, 5 Sawy. 172, Fed. Cas. No. 3,057.

peal had been taken would be insufficient.²⁰ This section provides that this writ shall command the State court to make return of the record of the cause removed.¹

§ 1142. Plaintiff may be ordered to replead if removing party cannot get record.

If it shall be impossible for the parties or persons removing any cause under this act, or complying with its provisions for the removal thereof, to obtain such copy, [i. e. copy of the record] for the reason that the clerk of said State court refuses to furnish a copy on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires a copy of the record to be filed as aforesaid.

Part of § 7, act Mar. 3, 1875, c. 137 18, Stat. 472, U. S. Comp. Stat. 1901, p. 512.

R. S. § 645⁴ provides generally for the relief of Federal suitors unable to obtain certified copies of State court records. The words "the prosecutor in any such action or proceedings to enforce forfeiture or recover penalty as aforesaid" are not clear, since they seem to refer only to plaintiffs in certain kinds of actions and "as aforesaid" does not appear to have an antecedent. There seem to have been no cases in which it has been necessary to resort to the above substitute for a proper transcript.

§ 1143. Procedure on removal for prejudice or local influence.

In cases where removal is sought for prejudice or local influence the procedure is not governed by the preceding sections.⁶ The right exists at any time before trial,^[b] and application is to the circuit court and not to the State court.^[e] Defendant seeking

²⁰Ellerman v. New Orleans R. Co.
² Woods, 120 Fed. Cas. No. 4382;
Insurance Co. v. Morse, 20 Wall. 445,
22 L. ed. 365; see Bell v. Dix, 49 N.
Y. 232.

¹United States v. McKee, 4 Dill. 1,
Fed. Cas. No. 15,687.
⁴Ante, § 396.
⁶See ante, § 1136.

removal on that ground should apply to the circuit court^[e] by petition^[c] supported by proofs in the form of affidavits^[d] or otherwise, showing that from prejudice or local influence he will not be able to obtain justice in the State courts. If satisfied with the showing the circuit court should then order removal. The removing party should then file that order in the State court, and take therefrom a transcript of the record and file it in the circuit court.^{[f]-[g]}

Author's section.

[a] History of legislation on subject.

The original law respecting removal on this ground enacted in 1867⁸ and carried forward into R. S. § 639, permitted removal on the petition of a party who was a citizen of another State than that in which the suit was brought, "whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reasons to believe," etc. The present law of 1887 and 1888, superseded these earlier requirements.⁹ It merely provides that a party defendant who is a citizen of another State, may remove "at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court."¹⁰ Aside from prescribing the time, and requiring application to be to the circuit rather than to the State court, the procedure is not indicated.¹¹ The statute being silent, the Supreme Court has held that the general rules respecting the transfer of causes from one court to another must obtain, and that the practice should be as above stated, or "if these exact steps are not requisite something equivalent thereto is."¹²

[b] Time for application.

The clause "at any time before trial," has come to have a settled meaning. It requires the application to be made before the first trial of the cause.¹⁴ Before trial means before final hearing.¹⁵ Filing of an answer is not a trial;¹⁶ nor are preliminary hearings.¹⁷ The law permits application at

⁸Act Mar. 2, 1867, c. 196, 14 Stat. U. S. 255, 37 L. ed. 442. 13 Sup. Ct. 558.

⁹Fisk v. Henarie, 142 U. S. 467, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; Minnick v. U. Ins. Co. 40 Fed. 371.

¹⁰See ante, § 136.

¹¹The act has frequently been criticized as unskillfully drawn: Fisk v. Henarie, 32 Fed. 420; Lookout M. Ry. v. Houston 32 Fed. 711; Vinal v. Continental C. Co. 34 Fed. 228; Gavin v. Vance, 33 Fed. 85.

¹²Pennsylvania Co. v. Bender, 148

U. S. 255, 37 L. ed. 442. 13 Sup. Ct. Rep. 591; Sparkman v. Sup. Council, 57 S. C. 20, 35 S. E. 392; see infra note [f].

¹⁴Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; Farmers' etc. National Bank v. Schuster, 86 Fed. 161, 29 C. C. A. 649.

¹⁵Fisk v. Henarie, 142 U. S. 467, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207.

¹⁶Durkee v. Ill. C. R. R. 81 Fed. 2.

¹⁷Lewis v. Smythe, 2 Woods, 119,

any time before actual trial on the merits whether at the first term at which such a trial was possible or later.¹⁸ The cause must be actually on trial in some form in the orderly course of proceeding, all parties acting in good faith, before the right of removal is gone.¹⁹ Application is too late after a mistrial.²⁰ It is usually too late after the impanelling of the jury.¹ But the time is not jurisdictional and a party may waive the objection that application is too late.²

[c] Necessity for petition.

The earlier laws required petition, but the present act specifies none.⁵ It is undoubtedly better practice to make the application in the form of petition;⁶ it becomes part of the record.⁷ The petition, by averments as to citizenship, and value in dispute, should make out a case of Federal cognizance, within the class removable for prejudice and local influence.⁸ The petition should also state the fact of prejudice or local influence.⁹ It is better practice to verify it.¹⁰ If verified it may stand as an affidavit.¹¹ It has been held that a petition which failed to show requisite citizenship and an order of removal thereon, did not actually remove a cause where the State court failed to recognize it as sufficient.¹²

[d] — affidavit and bond.

The present law also omits the previous requirement as to an affidavit. It merely requires the fact of prejudice to be made to appear to the circuit court. Affidavit cannot therefore be said to be essential,¹⁶ yet it is certainly proper to file one or more affidavits in support of the petition.¹⁷ While the petition may allege the prejudice in the words of the statute, the

Fed. Cas. No. 8,333. But sustaining of general demurrer is: *Hobart v. Ill. C. R. R.* 81 Fed. 5.

¹⁸*Detroit v. Detroit City Ry.* 54 Fed. 10.

¹⁹Removal cases 100 U. S. 473, 25 L. ed. 593; *Bank of Maysville v. Claypool*, 120 U. S. 270, 30 L. ed. 632, 7 Sup. Ct. Rep. 545.

²⁰*McDonnell v. Jordan*, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 886; *Davis v. Chicago Ry.* 46 Fed. 307; *Farmers Nat. Bank v. Schuster*, 86 Fed. 161, 29 C. C. A. 649.

¹*Anglo Am. Co. v. Evans*, 34 Neb. 44, 51 N. W. 310; *St. Anthony Co. v. King Co.* 23 Minn. 188, 23 Am. Rep. 682.

²*Knight v. International R. R.* 61 Fed. 90, 9 C. C. A. 376; *Wyly v. Richmond R. R.* 63 Fed. 487; ante, § 1136 [m].

⁵See *Short v. Chicago, etc. Ry.* 34 Fed. 227.

⁶See *Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 441, 13 Sup.

Ct. Rep. 591; *Baird v. Richmond, etc. R. R.* 113 N. C. 610, 18 S. E. 700, 37 Am. St. Rep. 639, 22 L.R.A. 627.

⁷See *McDonnell v. Jordan*, 178 U. S. 234, 44 L. ed. 1050, 20 Sup. Ct. Rep. 886.

⁸See *Short v. Chicago, etc. Ry.* 34 Fed. 227, holding mere affidavit sufficient. *Hall v. Chattanooga A. Wks.* 48 Fed. 599; *Bradly v. Ohio R. Co.* 78 Fed. 388; *Grand T. Ry. v. Twitchell*, 59 Fed. 727, 8 C. C. A. 237; *Harrison v. Shorter*, 59 Ga. 512.

⁹See *Campbell v. Collins*, 62 Fed. 849; *Collins v. Campbell*, 62 Fed. 851; *Tod v. Cleveland, etc. R. R.* 65 Fed. 146, 12 C. C. A. 581; *Goldworthy v. Chicago Ry.* 38 Fed. 769.

¹⁰*Bonner v. Meikle*, 77 Fed. 486.

¹¹*Fisk v. Henarie*, 35 Fed. 233.

¹²*Bradley v. Ohio Ry.* 78 Fed. 388.

¹⁶See *Bonner v. Meikle*, 77 Fed.

¹⁷See in re *Pennsylvania Co.* 137

U. S. 451, 34 L. ed. 739, 11 Sup. Ct. Rep. 141.

supporting affidavit should not, merely reiterate the statutory provision,¹⁸ nor allege the petitioner's belief of such fact,¹⁹ and it is better to set forth also facts and circumstances.²⁰ Yet an affidavit in the words of the statute is *prima facie* sufficient.¹ The fact that affidavit is on information and belief is not a fatal objection when it is positive in form and sets forth facts and circumstances.² A removal bond has frequently been tendered the circuit court along with the petition and affidavit, in cases of this character.³ Yet the statute does not require it. And there is not the same need for it as in the class of cases where filing of petition and bond in the State court *ipso facto* terminates its jurisdiction.⁴ Yet the practitioner cannot safely be advised to omit it, in view of the unfortunate vagueness in the law respecting the procedure in these cases.

[e] Application to circuit court and disposal thereof.

The application for removal in this class of cases is made directly to the circuit court instead of to the State court.⁵ The statute does not require the application to be made upon notice to the opposite party.⁷ Yet many cases have declared it the better practice to give notice.⁸ If granted *ex parte*, the opposite party may have opportunity to contest the facts alleged, on motion to remand.⁹ The statute in effect requires that prejudice or local influence such as to prevent defendant from obtaining justice in the

¹⁸*Goldworthy v. Ry.* 38 Fed. 769.

¹⁹*In re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 739, 11 Sup. Ct. Rep. 141; *Reeves v. Corning*, 51 Fed. 776; *Tacoma v. Wright*, 84 Fed. 838.

²⁰*Malone v. Richmond*, 35 Fed. 625; *Southworth v. Reid*, 36 Fed. 451; *Amy v. Manning*, 38 Fed. 536, 868; *Detroit v. City Ry.* 54 Fed. 1; *Schwenk v. Strang*, 59 Fed. 209, 8 C. C. A. 92; *Paul v. Baltimore, etc.* R. R. 44 Fed. 514; *Niblock v. Alexander*, 44 Fed. 306; *Hall v. Chattanooga Wks.* 48 Fed. 599; *Crotts v. Southern R. R.* 90 Fed. 2.

¹*Whelan v. N. Y. etc. R. R.* 35 Fed. 849, 1 L.R.A. 65; *Huskins v. Cincinnati R. R.* 37 Fed. 504, 3 L.R.A. 545; *Minnick v. Union Ins. Co.* 40 Fed. 369; *Cooper v. Richmond R. R.* 42 Fed. 697, 8 L.R.A. 366; *Brodhead v. Shoemaker*, 44 Fed. 518, 11 L.R.A. 567.

²*Detroit v. Detroit C. Ry.* 54 Fed. 1. But see *Curnow v. Phoenix Ins. Co.* 44 Fed. 305.

³See recitals in removal order in *Crotts v. Southern Ry.* 90 Fed. 2; *Parks v. So. Ry.* 90 Fed. 4; *Anglo-Am. Co. v. Evans*, 34 Neb. 44, 51 N.

W. 310; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591.

⁴*Ante*, § 1138.

⁵*Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 442, 13 Sup. Ct. Rep. 591; *Bellaire v. Baltimore, etc.* R. R. 146 U. S. 117, 36 L. ed. 910, 13 Sup. Ct. Rep. 16; *Bonner v. Meikle*, 77 Fed. 485; *Southworth v. Reid*, 36 Fed. 451. But see *Short v. Chicago, etc. R. R.* 33 Fed. 114.

⁷See *Reeves v. Corning*, 51 Fed. 777, and *Crotts v. So. Ry.* 90 Fed. 2, and cases cited; *Montgomery Co. v. Cochran*, 116 Fed. 985.

⁸*Carson v. Holtzelaw*, 39 Fed. 580; *Schwenk v. Strang*, 59 Fed. 211, 8 C. C. A. 92; *Bonner v. Meikle*, 77 Fed. 485; *Smith v. Crosby*, 46 Fed. 820; *Herndon v. Southern Ry.* 73 Fed. 307; see *Campbell v. Collins*, 62 Fed. 849; *Collins v. Campbell*, 62 Fed. 851.

⁹*Smith v. Crosby*, 46 Fed. 819; *Montgomery Co. v. Cochran*, 116 Fed. 985; *Ellison v. Ry. Co.* 112 Fed. 805, 50 C. C. A. 530; *Dennison v. Brown*, 38 Fed. 535. Otherwise if not *ex parte*; *Seaboard A. L. v. North C. R.* 123 Fed. 629.

State court, be "made to appear" to the circuit court.¹⁰ This requires the court to act judicially on the application and not merely ministerially. It requires that the circuit court be satisfied legally, and not merely morally, as to the fact of such local influence or prejudice and the alleged result.¹¹ But if the circuit court deem sufficient a single affidavit declaring the result in general terms, the Supreme Court will not hold that insufficient, as a matter of law, although an allegation upon mere belief would not suffice.¹² Much is left to the discretion of the court in individual cases. For the most part the courts insist on a full hearing with affidavits, and perhaps oral testimony,¹³ and require notice to the adverse party, and permit a showing against the application by counter affidavits or otherwise¹⁴ and refuse the removal where there is merely an affidavit alleging the facts in about the terms of the statute,¹⁵ or insufficient proof.¹⁶ On the other hand removal has been ordered upon an affidavit merely stating the statutory facts unequivocally;¹⁷ although the preponderance of authority is in favor of a more complete showing.¹⁸

[f] Order of removal.

It is necessary that the circuit court make a formal order for the removal of the cause and its minute entry declaring that the party is entitled to remove will not suffice.¹ The order should then be filed in the State court.² As the circuit court's order of removal seems to be an important jurisdictional factor in cases of this character, it seems advisable that it show the jurisdictional diverse citizenship as well as declare the necessary local prejudice;³ for it must be borne in mind that the record on appeal must affirmatively show that the case is of Federal cognizance.⁴ Moreover, as it is the order that is to be filed in the State court, it seems due to the State tribunal that the paper there filed show all the facts to

¹⁰Supra note [a].

¹¹In re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Fisk v. Henare, 142 U. S. 459, 35 L. ed. 1083, 12 Sup. Ct. Rep. 207; Crotts v. Southern Ry. 90 Fed. 2; see Walcott v. Watson, 46 Fed. 532, where facts were made out.

¹²In re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Hakes v. Burns, 40 Fed. 33; Minnick v. Union Ins. Co. 40 Fed. 371.

¹³Carson v. Holtzclaw, 39 Fed. 578; Schwenk v. Strang, 59 Fed. 209, 8 C. C. A. 92; Malone v. Richmond R. R. 35 Fed. 628; Dennison v. Brown, 38 Fed. 535; Tacoma v. Wright, 84 Fed. 836.

¹⁴Short v. Chicago, etc. R. R. 34 Fed. 225; Ellison v. Louisville R. R. 112 Fed. 805, 50 C. C. A. 530; Maher v. Tower H. Co. 94 Fed. 225.

¹⁵Malone v. Richmond, etc. R. R. 35 Fed. 625; Niblock v. Alexander. 44 Fed. 306; Paul v. Baltimore, etc. R. R. 44 Fed. 514; Amy v. Manning. 38 Fed. 536.

¹⁶Turnbull v. Linthicum Co. 80 Fed. 4; Dennison v. Brown, 38 Fed. 535.

¹⁷Whelan v. Ry. Co. 35 Fed. 849, 1 L.R.A. 65; Short v. Ry. Co. 34 Fed. 227; Brodhead v. Shoemaker, 44 Fed. 518, 11 L.R.A. 567; Franz v. Wahl, 81 Fed. 9.

¹⁸Crotts v. Southern Ry. 90 F. l. 1, 3.

¹Pennsylvania Co. v. Bender, 148 U. S. 255, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

²Ibid.

³See Bradley v. Ohio, etc. R. R. 119 N. C. 744, 26 S. E. 169.

⁴Ante, § 9.

bring the case within the statute.⁵ In some cases the order has contained a direction to the clerk of the State court to certify a copy of the record.⁶ While the circuit court has power to resort to certiorari to obtain a copy of the record,⁷ it is primarily the removing party's duty to procure and file such transcript,⁸ so that the propriety of such a direction in the removal order may be open to question.

It would seem that the uncertainties in the statute are best resolved by adhering to the settled rules of preceeding for removal in other cases, whenever they furnish a just analogy.⁹ Those rules suggest the advisability of presenting the circuit court's removal order to the State court and not merely filing it in the clerk's office.¹⁰ They suggest also the advisability of some order by the State court in the premises, which, while not essential, would always be proper and useful as a manifestation of its attitude.¹¹ Denial by a State court of removal in a proper case is reviewable in the Supreme Court on error,¹² and the right of review would certainly be best preserved by actual presentation of an order which upon its face showed a case within the statute, to the court itself, and in such a way that its action thereon would become part of the record in the cause. The propriety of the State court's action is determined on error, by that which appears in its own record.¹⁴

[g] When State jurisdiction terminates.

It is clear that the mere entry of a removal order by the circuit court does not terminate the State court's jurisdiction;¹⁶ and that it must be filed in the State court.¹⁷ But the authorities have not yet satisfactorily determined, whether the State jurisdiction ceases upon the filing of the order in the State court, and whether the Federal jurisdiction attaches then and in advance of the filing of the record. This would, however, seem to be so where the proceeding in the circuit court was taken in time, the local prejudice was "made to appear," and the requisite diverse citizenship was shown.¹⁸ It has been held that by the petition a cause is not removed

⁵It has been held proper to certify to the state court a copy of all the proceedings: *Lawson v. Richmond Ry.* 112 N. C. 394, 17 S. E. 169; *Baird v. Richmond Ry.* 113 N. C. 605, 18 S. E. 698.

⁶See *Crotts v. Southern Ry.* 90 Fed. 2; *Parks v. Southern Ry.* 90 Fed. 4. For other orders see *Anglo-Am. Co. v. Evans*, 34 Neb. 44, 51 N. W. 310; *Howard v. Stewart*, 34 Neb. 769, 52 N. W. 714.

⁷Post, § 1146.

⁸See *Miller v. Wattier*, 24 Fed. 49.

⁹See *Pennsylvania Co. v. Bender*, 148 U. S. 251, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

¹⁰See *Pennsylvania Co. v. Bender*,

148 U. S. 251, 37 L. ed. 442, 13 Sup. Ct. Rep. 591; ante, § 1138 [c]. Or serving it on both judge and clerk: *Walcott v. Watson*, 46 Fed. 532.

¹¹*Baird v. Richmond Ry.* 113 N. C. 605, 18 S. E. 698; see *Miller v. Tobin*, 18 Fed. 613; ante, § 1138 [d].

¹²Ante, § 1138 [g].

¹⁴*Pennsylvania Co. v. Bender*, 148 U. S. 251, 37 L. ed. 441, 13 Sup. Ct. Rep. 591.

¹⁶*Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 442, 13 Sup. Ct. Rep. 591.

¹⁷*Ibid.*

¹⁸See *Walcott v. Watson*, 46 Fed. 529, 532, holding state court should proceed no further after filing and serving of order.

although an order to that effect has been filed in the State court, if the petition did not show the requisite citizenship and the State court refused to relinquish jurisdiction.¹⁹

§ 1144. Procedure when party believes cause removable because land grants from different States will be in issue.

If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act,¹ remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Part of § 3, act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended act Mar. 3, 1887, c. 373 § 1, 24 Stat. 552, corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 510.

The original enactment upon this subject was contained in the judiciary act of 1789,² and was carried forward into § 647 of the Revised Statutes. It made the jurisdictional value \$500 exclusive of costs,³ and permitted removal only by the party claiming under grant from a State "other than that in which the suit is pending."⁴ R. S. § 647 was re-enacted with some changes, in section three of the act of 1875 and hence was superseded al-

¹⁹Bradley v. Ohio Ry. 78 Fed. 387.

¹See ante, §§ 1136-1138.

²Act Sept. 24, 1789, c. 20, § 12,
1 Stat. 79.

³As to value in dispute: Thompson v. Kendricks, 5 Hayw. 115.

⁴Shepherd v. Young, 1 T. B. Mon. 203.

though not expressly repealed.⁵ The act of 1875 raised the jurisdictional value to \$2,000 "exclusive of interest and costs," and permitted removal by either claimant whether under the foreign or the domestic State grant. It will be observed that the above proceeding is permitted any time "before the trial;"⁶ and that it is now the only case where plaintiff as well as defendant may remove a cause.⁷ Jurisdiction over controversies between claimants under land grants from different States is conferred upon the Federal courts by the Federal constitution.⁸

§ 1145. Procedure on removal of suits against revenue officers or involving revenue law.

Any civil suit or criminal prosecution . . . [against a revenue officer or involving a revenue law, which is removable to the Federal court]¹⁰ may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court.

Part of R. S. § 643, U. S. Comp. Stat. 1901, p. 521.

The first part of the section prescribes the right of removal upon this ground.¹¹ The remainder is contained in the two following sections.¹² The legislative history and validity of R. S. § 643 are elsewhere considered.¹³ A prosecution on a felony charge is not commenced within this section by

⁵Osgood v. C. D. R. R. 6 Biss. 330, Fed. Cas. No. 10,604.

⁶See post. § 1140 [b] as to the interpretation of this clause.

⁷It is often said that in no case can plaintiff now remove. See ante, § 1136 [a].

⁸Ante, § 2.

¹⁰See ante, § 138.

¹¹Ante, § 138.

¹²Post, §§ 1142-1144.

¹³Ante, § 138.

a preliminary examination, but only by the finding of indictment or equivalent act.¹⁶ But minor prosecutions are removable from before the justice of the peace.¹⁷ "Final hearing" is used with reference to equity procedure and means the final hearing in the court of original cognizance and not on appeal.¹⁸ If removal is prematurely had mandamus will lie to compel the circuit court to remand.¹⁹

The circuit court's jurisdiction depends upon a proper petition;²⁰ and attaches at once upon the filing thereof,¹ although the State jurisdiction does not cease until filing of certiorari or habeas corpus.² It is for the circuit court to determine the sufficiency of the petition.³ It must specify the act done,⁴ but not minutely, so long as it shows suit for an act done under Federal law.⁵ The clerk is to enter the cause forthwith upon the filing of petition.⁶

§ 1146. — certiorari or habeas corpus to State court, which should proceed no further.

When the suit is commenced in the State court by summons, subpoena, petition or another process except capias, the clerk of the circuit court shall issue a writ of certiorari to the State court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as

¹⁶Virginia v. Paul, 148 U. S. 119, 37 L. ed. 386, 13 Sup. Ct. Rep. 539; Post v. U. S. 161 U. S. 587, 40 L. ed. 817, 16 Sup. Ct. Rep. 613, overruling North C. v. Kirkpatrick, 42 Fed. 689; Georgia v. Bolton, 11 Fed. 217; State v. Port, 3 Fed. 117. See also State v. Felts, 133 Fed. 85.

¹⁷Virginia v. Bingham, 88 Fed. 561.

¹⁸Brice v. Somers, 1 Flipp. 574, Fed. Cas. No. 1, 856. "Before trial" is used in other removal provisions. See ante, § 1139 [b].

¹⁹Virginia v. Paul, 148 U. S. 123, 37 L. ed. 386, 13 Sup. Ct. Rep. 540. The petition may be filed at any time before trial, at the place where the

next term thereafter is to be held: State v. Felts, 133 Fed. 85.

²⁰Virginia v. Paul, 148 U. S. 114, 37 L. ed. 389, 13 Sup. Ct. Rep. 536. The petition, however, creates only a prima facie case and the burden of proof is on defendant: State v. Felts, 133 Fed. 85.

¹Davis v. South Carolina, 107 U. S. 597, 27 L. ed. 574, 2 Sup. Ct. Rep. 636; State v. Sullivan, 50 Fed. 593.

²Post, § 1142.

³Dennistoun v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804.

⁴Ex parte Anderson, 3 Woods, 124, Fed. Cas. No. 349.

⁵Abranches v. Schell, 4 Blatchf. 256, Fed. Cas. No. 21.

⁶In re Clark's charges, 5 Fed. 441.

aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the State court shall be void.

Part of R. S. § 643, U. S. Comp. Stat. 1901, p. 521.

The remainder of R. S. § 643 is given elsewhere.⁸ If the court is not in session it becomes the clerk's duty to issue certiorari or habeas corpus after first satisfying himself of the sufficiency of the petition.¹⁰ A deputy clerk may issue the writ of certiorari.¹¹ The State court's jurisdiction does not cease until the filing of therein of certiorari or habeas corpus.¹² Orders by the State court after removal are void.¹³ The finding of an indictment after removal has been perfected is such further proceeding in the State court as is forbidden and is void.¹⁴ The bail given in the State court are discharged from their undertaking by the removal;¹⁵ if duly taken.¹⁶

§ 1147. — duty of marshal if defendant in custody.

If the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal by virtue of the writ of habeas corpus cum causa to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof.

Part of R. S. § 643 U. S. Comp. Stat. 1901, p. 521.

The remainder of R. S. § 643 is given in preceding and following Code section, and elsewhere.¹

§ 1148. — proceeding when copy of State record cannot be had.

If, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court can be obtained, the circuit court may allow and require the plaintiff to proceed de novo, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On

⁸Ante, §§ 138, 1141; post, § 1143, 1144.

¹⁰Salem, etc. R. R. v. Boston, etc. R. R. 21 Law. Rep. 210, Fed. Cas. No. 12,249; see North Carolina v. Kirkpatrick, 42 Fed. 689.

¹¹State v. Sullivan, 50 Fed. 593.

¹²Virginia v. Rives, 100 U. S. 316, 25 L. ed. 667; Virginia v. Paul, 148 U. S. 114, 37 L. ed. 389, 13 Sup. Ct. Rep. 539; State v. Port, 3 Fed. 124.

¹³McCullough v. Large, 20 Fed. 310.

¹⁴North Carolina v. Kirkpatrick, 42 Fed. 691.

¹⁵Davis v. South Carolina, 107 U. S. 601, 27 L. ed. 574, 2 Sup. Ct. Rep. 636.

¹⁶Hunter v. Colquitt, 73 Ga. 46.

¹Ante, §§ 138, 1141, 1142; post, § 1144.

failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

Part of R. S. § 643, U. S. Comp. Stat. 1901, p. 521.

The remainder of R. S. § 643 is given elsewhere in the text.³ The case proceeds in the Federal court as though originally there brought and is governed by Federal practice;⁴ although the State law as to the substance of an offense prevails.⁵ If a criminal prosecution is removed the State attorney⁶ or a special appointee of the court⁷ continues the prosecution.

§ 1149. Procedure on removal by defendant denied civil rights.

Any civil suit or criminal prosecution [which is removable because involving a denial of any civil right of defendant]¹⁰ . . . may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, in the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court.

Part of R. S. § 641, U. S. Comp. Stat. 1901, p. 520.

The first part of R. S. § 641 is given in a preceding chapter,¹¹ and the remainder in the following sections.¹² A prosecution for a felony is not commenced within this section until indictment found or some equivalent proceeding.¹³ After trial is commenced removal cannot be had on this ground and judicial infractions of civil rights at the trial must be left to the revisory power of the Federal courts.¹⁴ The right of removal is given only to defendants,¹⁵ but to each defendant.¹⁶ The section provides for removing the whole suit.¹⁷

³Ante, §§ 138, 1141-1143.

⁴Coggill v. Lawrence, 2 Blatchf. 304, Fed. Cas. No. 2,957, as to costs; Richter v. Magone, 47 Fed. 192, as to costs; Georgia v. O'Grady, 3 Woods, 496, Fed. Cas. No. 5,352, challenge of jurors.

⁵Georgia v. O'Grady, 3 Woods, 496, Fed. Cas. No. 5,352; North Carolina v. Gosnell, 74 Fed. 734.

⁶Delaware v. Emerson, 8 Fed. 411.

⁷Georgia v. Bolton, 11 Fed. 217, 219.

¹⁰Ante, § 137.

¹¹See ante, § 137, giving the legislative history of R. S. 641.

¹²Post, § 1146.

¹³Com. v. Artman, 3 Grant. Cas. 436; see Virginia v. Paul, 148 U. S. 119, 37 L. ed. 386, 13 Sup. Ct. Rep. 539, so ruling under R. S. § 643, ante, § 1141.

¹⁴Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Murray v. La. 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990.

¹⁵Cole v. Garland, 107 Fed. 759, 46 C. C. A. 626.

¹⁶State v. Common Pleas, 15 Ohio St. 377.

¹⁷Fisk v. U. P. R. R. 6 Blatchf. 362, Fed. Cas. No. 4,827.

The petition should show which civil rights have been denied;¹⁸ and otherwise affirmatively show a case within the statute.¹⁹ Upon filing of proper verified petition the cause is removable as of course.²⁰ The State court's jurisdiction ceases if a removable case is duly made out, and its assent to the removal is unnecessary.¹ The Federal court is entitled to assert its jurisdiction by proper process and the State court should yield obedience thereto.² But the State court has a right to examine the sufficiency of the removal petition.³ Further proceeding in the State court will be void.⁴

§ 1150. — filing of record and penalty for neglect by clerk or plaintiff.

It shall be the duty of the clerk of the State court to furnish such defendant petitioning for a removal copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy.

Part of R. S. § 641, U. S. Comp. Stat. 1901, p. 520.

The preceding parts of R. S. § 641, are given in preceding sections.⁶ The last part appears in the next section.⁷ It will be observed that this section applies on to a failure of the State clerk and not of the court, and refusal by the latter is to be met by the proceeding pointed out in R. S. § 642.⁸

¹⁸State v. Gleason, 12 Fla. 190.

¹⁹Patrie v. Murray, 43 Barb. 323; Hodson v. Milward, 3 Grant, 412; see Jones v. Seward, 40 Barb. 563; Short v. Wilson, 1 Bush. 350.

²⁰Siebrecht v. Butler, 2 Abb. Pr. N. S. 361; State v. Common Pleas, 15 Ohio St. 377.

¹Bell v. Dix, 49 N. Y. 232. Compare ante, § 1138 [f].

²In re Wells, 3 Woods, 128, Fed. Cas. No. 17,386.

³In re Wells, 3 Woods, 128, Fed. Cas. No. 17,386. Compare ante, § 1138 [c] [d].

⁴Ex parte Reynolds, 3 Hughes, 559, Fed. Cas. No. 11,720.

⁶Ante, §§ 137, 1145.

⁷Post, § 1147.

⁸Post, § 1148. Ex parte Wells, 3 Woods, 128, Fed. Cas. No. 17,386.

§ 1151. — penalty where removing party neglects to file record.

But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof,¹⁰ the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for a removal had been filed.

Last part of R. S. § 641, U. S. Comp. Stat. 1901, p. 520.

The preceding portions of R. S. § 641 are given elsewhere.¹¹

§ 1152. — defendant in custody to be transferred to marshal.

When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section,¹² have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

R. S. § 642 U. S. Comp. Stat. 1901, p. 521.

The acts of 1887 and 1888 expressly declared that this provision was not to be deemed repealed by them.¹³ This is the orderly procedure in cases where the State court and not merely its clerk fails to recognize the removal.¹⁴ The writ of habeas corpus must be allowed by the judge before it can be issued.¹⁵

§ 1153. Attachment, bond, and injunction orders, etc. in State court unaffected by removal.

When any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it

¹⁰Ante, § 1146.

¹¹Ante, §§ 137, 1145, 1146.

¹²Ante, §§ 1145, 1147.

¹³§ 5, Act Mar. 3, 1887, c. 373, 24

Stat. 552, as corrected Aug. 13, 1888, c. 866, § 5, 25 Stat. 436.

¹⁴In re Wells, 3 Woods, 128, Fed.

Cas. No. 17,386.

¹⁵Ibid.

been rendered by the court in which said suit was commenced;^[b] and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal;^[c] and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.^[d]

§ 4 of act Mar. 3, 1875, c. 137, 18 Stat. 471, U. S. Comp. Stat. 1901, p. 511.

[a] Prior legislation.

R. S. § 646 covered the same ground as the above provision and would seem to be superseded by it. In the absence of provision in the act of 1866 for continuing an injunction it was held dissolved by removal.¹ The judiciary act of 1789 confined the clause respecting attachment to any attachment, "by the original process."² R. S. § 646 confined the clause respecting bonds and undertakings to "any bond of indemnity or other obligation given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process."³

[b] Attachment unaffected by removal.

The circuit court becomes clothed with the powers of the State court under this provision;⁴ and the attachment holds the property after removal.⁵ If the party had made application for an attachment, he may proceed to get an attachment after removal;⁶ but if it be a separate process, it will not carry with it a lien on the property in case of removal. A motion to dissolve an attachment when authorized by the State law may be made in the circuit court, and if denied may be renewed at the discretion of the court.⁷ Where attachment suits are removed the rule of distribution and priority of liens will be the same as it would in a State court.⁸ The same rule will be followed as to sale of perishable property.¹⁰ The res in custody at the time of removal rightfully passes to the circuit court;¹¹ and the marshal may take the attached property from the sheriff.¹² Where foreign attachment is resorted to in the State court to compel ap-

¹McLeod v. Duncan, 5 McLean, 342 Fed. Cas. No. 8,898; Hatch v. Railroad Co. 6 Blatchf. 105, Fed. Cas. No. 6,204.

²See Barney v. Globe Bank, 5 Blatchf. 107, Fed. Cas. No. 1031.

³See U. S. Comp. Stat. 1901, p. 523.

⁴Garden City Manuf. Co. v. Smith, 1 Dill. 305; Fed. Cas. No. 5,217; Le-favour v. Whitman S. Co. 65 Fed. 785.

⁵New England Screw Co. v. Bliven, 3 Blatchf. 240, Fed. Cas. No. 10,156:

Barney v. Globe Bank, 5 Blatchf. 107, Fed. Cas. No. 1,031.

⁶Bills v. N. O. St. L. & C. R. Co. 13 Blatchf. 227, Fed. Cas. No. 1,409.

⁷Garden City Manuf. Co. v. Smith, 1 Dill. 305, Fed. Cas. No. 5,217.

⁸Bankers' M. & T. Co. v. Chicago C. Co. 28 Fed. 398.

¹⁰New York etc. Co. v. Second Nat. Bank, 10 Fed. 204.

¹¹Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354.

¹²Friedman v. Israel, 26 Fed. 801.

pearance, if defendant appear and remove the cause to the Federal court that court has jurisdiction to proceed;¹³ and the same is true where such party first gives bond in the State court for release of the attached property.¹⁴

[c] Bonds or security given in State court remain binding.

An undertaking for costs indorsed on the original writ continues a valid obligation in the Federal court.¹⁵ Bonds given in the State court are to be read as though containing a condition covering the eventuality of removal.¹⁷

[d] Injunction to continue until modified.

If injunction was granted in the State court it will continue in force until modified or dissolved by the circuit court;¹⁹ and the same is true of orders made before removal.²⁰ The provision indicates a clear intent that the continuance of injunction be dealt with by the Federal court;¹ which has power to impose conditions in modifying the injunction granted;² or to refuse to carry out an order at variance with the Federal law.³ However it should not dissolve an injunction regularly obtained under State practice, because of the absence of verification necessary by the Federal rule;⁴ nor in advance of the term for filing the removed record, where the rights of the parties would in effect be changed or finally determined thereby.⁵ As R. S. § 720 forbids injunction by a Federal court against proceedings in a State court,⁶ parties were tempted to try an evasion of that prohibition, under earlier removal laws permitting removal by plaintiff to the suit. This led to some question as to the propriety of holding that an injunction by a State court against State court proceedings continued in force after removal.⁷ Now that removal may only be had by defendant, opportunity for this evasion of R. S. § 720 is gone, and it is settled that injunction by a

¹³Irvine v. Lowry, 14 Pet. 299, 10 L. ed. 462; Barney v. Globe Bank, 5 Blatchf. 107, Fed. Cas. No. 1,031.

¹⁴Purdy v. Muller, 81 Fed. 513. See as to appearance as waiver: ante, § 860 [b].

¹⁵Pullmans Co. v. Washburn, 66 Fed. 790.

¹⁷See State v. Peck, 32 W. Va. 606, 9 S. E. 919.

¹⁹Northwestern D. Co. v. Corse, 4 Biss. 514, Fed. Cas. No. 10,335; McLeod v. Duncan, 5 McLean, 342, Fed. Cas. No. 8,898; Peters v. Peters, 41 Ga. 242.

²⁰Boatmans' Bank v. Wagenspack, 12 Fed. 66, 4 Woods 130; Champlain Co. v. O'Brien, 107 Fed. 334. They should be enforced by the circuit court: Williams etc. Co. v. Raynor, 7 Biss. 245, Fed. Cas. No. 17,748.

But see ex parte Fisk, 113 U. S. 725, 38 L. ed. 1122, 5 Sup. Ct. Rep. 724.

¹Watson v. Bonderant, 2 Woods, 166, Fed. Cas. No. 17,278; Perry v. Sharpe, 8 Fed. 24; Smith v. Schwed, 6 Fed. 455, 2 McCrary 441. See Charge to Grand Jury, 3 Hughes, 576, Fed. Cas. No. 18,259; see post, § 1157 [c].

²Ex parte Fisk, 113 U. S. 725, 28 L. ed. 1122, 5 Sup. Ct. Rep. 724.

³Portland v. Oregon Ry. 7 Sawy. 122, 6 Fed. 321.

⁴Smith v. Schwed, 6 Fed. 455, 2 McCrary 441.

⁵New Orleans Ry. v. Crescent Ry. 5 Fed. 160.

⁶Ante, § 20.

⁷Bondurant v. Watson, 103 U. S. 281, 26 L. ed. 448.

State court against State court proceedings continues after removal notwithstanding R. S. § 720.⁸

§ 1154. Duty to remand at any time if cause not properly removable.

If, in any suit . . . removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been . . . removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case . . . removable under this act, the said circuit court shall proceed no farther therein, but shall . . . remand . . . [the suit] to the court from which it was removed, . . . and shall make such order as to costs as shall be just.^{[a]-[f]}

§ 5 of act Mar. 3, 1875, c. 137, 18 Stat. 472, as amended by act of Mar. 3, 1887, c. 373, § 6, 24 Stat. 555, corrected Aug. 13, 1888, c. 866, § 6, 25 Stat. 436, U. S. Comp. Stat. 1901, p. 511.

[a] Duty of court to remand only for jurisdictional defects.

The amendment of 1887 consisted in repealing a clause making the remanding order appealable.¹⁰ This section also provides for dismissal of causes at any time if improperly instituted in the circuit court,¹¹ the scope and effect of that provision having been considered elsewhere.¹² The foregoing provision deals with remand for defects jurisdictional in character; and directs remand in such cases "at any time." But it does not apply to defects or irregularities in the mode of removing the cause which are not jurisdictional.¹³ Those defects may be waived.¹⁴ Many defects in the petition¹⁵ or bond¹⁶ may be waived or corrected by amendment in the circuit court. So, objection that removal was not taken in due season may be waived;¹⁷ and failure to file the record in due season is not a jurisdictional defect.¹⁸ Hence while the court is required to notice jurisdictional defects without motion for remand being made,¹⁹ and to remand

⁸Hunt v. Fisher, 29 Fed. 805; see Lawrence v. Morgan Co. 121 U. S. 637, 30 L. ed. 1019, 7 Sup. Ct. Rep. 1013. See in addition to above cases: Eureka Ry. v. Cal. Ry. 103 Fed. 897.

¹⁰See post, § 1156.

¹¹See ante, § 818, where the section is given in full.

¹²Ante, § 818.

¹³Osgood v. Chicago, etc. R. R. 6 Biss. 330, Fed. Cas. No. 10,604.

¹⁴Dennis v. Alachua Co. 3 Woods, 683, Fed. Cas. No. 3,791; Brice v. Somers, 8 Chic. L. N. 290, 1 Flip. 574, Fed. Cas. No. 1,856.

¹⁵Ante, § 1136 [h].

¹⁶Ante, § 1137 [d].

¹⁷Ante, § 1136 [m].

¹⁸Ante, § 1139 [a].

¹⁹Beede v. Cheeney, 5 Fed. 388; Indiana v. Tolleston Club, 53 Fed. 18; in re Foley, 76 Fed. 390.

therefor "at any time,"²⁰ less vital irregularities or defects must be made the basis of motion to remand, and seasonably urged, or else they are waived.¹

[b] Motion to remand.

There is no general statute or rule governing the practice on motion to remand; although there are local rules of court in some districts. Indeed under this section the mode of raising the question of want of jurisdiction is immaterial, because the court's duty is prescribed by the statute.⁴ Motion to remand is equivalent to a plea to the jurisdiction.⁵ It should be in the form of petition in writing, setting for the grounds upon which remand is asked,⁶ e. g. that the petition was not filed in time.⁷ The motion should be upon notice;⁸ and it should be to remand and not to dismiss,⁹ nor for dismissal and nonsuit.¹⁰ The opposite party may, traverse or otherwise plead to the petition at least where motion is based upon non-jurisdictional defects.¹¹ Motion to remand an indictment found in a State court may be made prior to the first day of the Federal term to which the record is returnable upon the production by the State, of copies of the papers.¹²

[c] Hearing and determination of motion.

When based upon jurisdictional defects, the motion to remand is determined on the face of the record;¹³ and the Federal jurisdiction must affirmatively appear therefrom;¹⁴ and cannot be supported by a showing subsequently made,¹⁵ or by ex parte affidavits correcting alleged error

²⁰Ayres v. Wiswell, 112 U. S. 190, 28 L. ed. 693, 5 Sup. Ct. Rep. 90.

¹Dennistown v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804; Murray v. Patrie, 5 Blatchf. 343, Fed. Cas. No. 9,967; Wood v. Matthews, 2 Blatchf. 370, Fed. Cas. No. 17,955; Anderson v. Appleton, 32 Fed. 857; Cameron v. Hodges, 127 U. S. 326, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; Turner v. F. L. & T. Co. 106 U. S. 555, 27 L. ed. 273, 1 Sup. Ct. Rep. 519.

⁴Briggs v. Traders Co. 145 Fed. 254.

⁵Mansfield, etc. Ry. v. Swan, 111 U. S. 384, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

⁶Lucker v. Phoenix Asso. Co. 66 Fed. 161; see Jones in DeLoy v. Trav. Ins. Co. 59 Fed. 320; Henderson v. Cabell, 43 Fed. 257; Chiatovich v. Hanchett, 78 Fed. 193.

⁷Martin v. Baltimore, etc. R. R. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533. But jurisdictional defects may be noticed although not

specified in the motion: See Tracy v. Morel, 88 Fed. 801.

⁸See Plymouth, etc. Co. v. Amador Co. 118 U. S. 269, 30 L. ed. 233, 6 Sup. Ct. Rep. 1034; Stadlemann v. White L. T. Co. 92 Fed. 209.

⁹Northern P. T. Co. v. Lowenberg, 18 Fed. 341; Cates v. Allen, 149 U. S. 460, 37 L. ed. 804, 13 Sup. Ct. Rep. 883.

¹⁰Dawson v. Kinney, 144 Fed. 710.
¹¹Lucker v. Phoenix Asso. Co. 66 Fed. 161.

¹²State v. Corrigan, 139 Fed. 758, see ante, § 1139 [b].

¹³Goodnow v. Litchfield, 4 McCrary, 217, 47 Fed. 753; Clarkhuff v. Wisconsin, etc. R. R. 26 Fed. 466; Mahin v. Pfeiffer, 27 Fed. 893; Smith v. Chicago etc. Ry. Co. 30 Fed. 722; McLane v. Leicht, 27 Fed. 887.

¹⁴Long v. Buford, 24 Fed. 248; Smith v. W. U. T. Co. 79 Fed. 132.

¹⁵Grand T. Ry. v. Twitchell, 59 Fed. 730, 8 C. C. A. 237.

therein.¹⁶ If the party desires to controvert the truth of the record he should file a plea to the jurisdiction.¹⁷ Sometimes motion to remand is heard upon a stipulation as to the facts.¹⁸ If the cause has been divided in the Federal Court into separate proceedings in the law and equity side, the granting of a motion to remand in the proceeding at law, would involve a similar ruling in equity.¹⁹

It has often been said to be proper to remand if the jurisdiction is doubtful;¹ in view of the complications and hardships possible from wrongful retention of jurisdiction.² But since 1887 the remanding order is no longer appealable,³ so that an aggrieved party would have no remedy⁴ and this affects the cogency of the argument favoring remand in case of doubt.⁵ Where a question raised by motion to remand has not been decided by the Supreme Court, the decision of a circuit justice will be followed by the district and circuit judges within a circuit;⁶ decisions by a circuit judge will be accepted by district judges of the circuit;⁷ and generally one district judge of the circuit will follow the ruling of another.⁸

[d] Order granting or denying motion and reconsideration thereof.

An order denying a motion to remand¹⁰ may be reconsidered at any time before final judgment.¹¹ It has been said that an order of remand¹² continues to be within the control of the circuit court, and may therefore be vacated, any time during the term,¹³ but not afterwards.¹⁴ In several cases

¹⁶Smith v. W. U. T. Co. 79 Fed. 132.

¹⁷Smith v. Chicago etc. Ry. Co. 30 Fed. 722. This is still proper though not indispensable since the act of 1875. See ante, § 818 [c].

¹⁸See Pacific R. R. v. Missouri P. R. R. 5 McCrary, 374, 23 Fed. 565; Sherwood v. Newport News, 55 Fed. 1.

¹⁹Utah, etc. Co. v. DeLamar, 145 Fed. 505.

¹Fitzgerald v. Ry. 45 Fed. 812; State v. Bradley, 26 Fed. 292; Concord C. Co. v. Haley, 76 Fed. 883; Nash v. McNamara, 145 Fed. 541; Groel v. United E. Co. 132 Fed. 252.

²See Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196.

³Post, § 1156.

⁴See Johnson v. F. C. Austin Mfg. Co. 76 Fed. 616; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288.

⁵Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288, see ante, § 818 [b].

⁶See Blackwell v. Braun, 1 Fed. 352, 4 Hughes 203; Kellogg v. Hughes, 3 Dill. 359, Fed. Cas. No.

7,662; Garner v. Second Nat. Bank, 66 Fed. 370.

⁷See Commercial Bank v. Corbett, 5 Sawy. 174, Fed. Cas. No. 3,058; Van Brunt v. Corbin, 14 Blatchf. 496, Fed. Cas. No. 16,832; McLane v. Leicht, 27 Fed. 888; Wilson v. Winchester, 82 Fed. 16.

⁸See Garner v. Second Nat. Bank, 66 Fed. 369; Monroe v. Williamson, 81 Fed. 977; Con. T. Co. v. Guarantors Co. 78 Fed. 657. But see Frisbie v. R. R. Co. 59 Fed. 369; Kansas, etc. Ry. v. Interstate L. Co. 37 Fed. 3.

¹⁰See form of order in Meissner v. Buek, 28 Fed. 164.

¹¹Missouri P. Ry. v. Fitzgerald, 160 U. S. 580, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; see illustrations: Greene v. Klinger, 10 Fed. 689; Wilkinson v. Ry. Co. 23 Fed. 561.

¹²See form of order in Akers v. Akers, 117 U. S. 198, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; Ayres v. Wiswall, 112 U. S. 189, 28 L. ed. 694, 5 Sup. Ct. Rep. 90.

¹³Birdseye v. Shaeffer, 37 Fed. 822.

¹⁴Galesburg v. Water Co. 27 Fed.

motion to rehear a remanding order has been considered, although the report does not show whether the remanding order had at the time been executed by being filed and entered in the State court.¹⁵ It is at least doubtful whether the circuit court has power to reconsider the order of remand after it has been executed;¹⁶ especially since the act of 1877 making the remanding order nonappealable and directing that the remand "be immediately carried into execution;"¹⁷ and the complications that might result from an affirmance of the power do not commend its assertion.¹⁸

[e] Effect of remand.

An order of remand restores the jurisdiction of the State court;¹ and the right to the custody of a defendant who was taken from the sheriff on habeas corpus cum causa.² The State court is not bound to recognize rulings made in the circuit court.³ It is entirely a question for the State court to determine what shall be done with pleadings, testimony, etc., taken in the Federal court.⁴ The removing party is not entitled to file a second petition after remand,⁵ unless amendment of the complaint is then made which first creates a removable case.⁶ The first removal petition is functus officio after remand.⁷ Costs are awarded against the party improperly removing the case;¹⁰ and if on appeal the Supreme Court holds the case should be remanded it has jurisdiction to decree costs against the removing party.¹¹

manding order. *Hamlet v. Fletcher*, 24 Fed. 305, refusing to rehear although not from want of power.

¹⁵*McLean v. St. Paul R. R.* 17 Blatchf. 367, Fed. Cas. No. 8,893.

¹⁶*Freeman v. Butler*, 39 Fed. 2.

¹⁷See post, § 1156. See also *En re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141, construing those words.

¹⁸While it is the rule that courts will exercise control over their orders and decrees during the term of their rendition this is not because they have jurisdiction to do so at the term, and none afterwards. The rule is a judge-made rule of manifest expediency but not one of jurisdictional power at all. Such a rule would have no considerations of expediency to recommend it in the case of a removal order; and it is certainly doubtful whether the circuit court has any jurisdiction in the case after the execution of the removal order.

¹*St. Paul, etc. R. R. v. McLean*, 108 U. S. 217, 27 L. ed. 705, 2 Sup. Ct. Rep. 498; see *Thacher v. McWilliams*, 47 Ga. 306; *Ex parte State*

Ins. Co. 50 Ala. 464; *Germania Ins. Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 674.

²*Virginia v. Paul*, 148 U. S. 123, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

³*Levinski v. Middlesex B. Co.* 92 Fed. 449, 34 C. C. A. 452.

⁴*Ayres v. Wiswall*, 112 U. S. 190, 28 L. ed. 694, 5 Sup. Ct. Rep. 90; *Birdseye v. Schaeffer*, 37 Fed. 823.

⁵*St. Paul, Etc. R. R. v. McLean*, 108 U. S. 217, 27 L. ed. 705, 2 Sup. Ct. Rep. 498; *Johnston v. Donovan*, 30 Fed. 395; *Smith v. Trav. Ins. Co.* 73 Fed. 513; *Pope v. Cheney*, 22 Fed. 177, 178; *Nichols v. Stevens*, 123 Mo. 120, 25 S. W. 584, 45 Am. St. Rep. 526.

⁶See *Jones v. Mosher*, 107 Fed. 561, 46 C. C. A. 471.

⁷*Ibid.*

¹⁰*Walker v. Collins*, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; see ante, § 818 [j].

¹¹*Mansfield, etc. Ry. v. Swan*, 111 U. S. 386, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Graves v. Corbin*, 132 U. S. 590, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *Kellam v. Keith*, 144 U. S. 570, 36 L. ed. 544, 12 Sup. Ct. Rep. 922.

§ 1155. Duty to remand as to some defendants, after removal for local prejudice.

If it . . . appear that said suit [i. e. one removed by a defendant for prejudice or local influence]¹³ can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court, shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

Part of § 2 act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended by act Mar. 3, 1887, c. 373, § 1, 24 Stat. 552, corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 509.

The foregoing provision was not in the section as originally adopted in 1875, but was added by amendment in 1887. The latter part of it, respecting removal by plaintiff, was made expressly applicable to pending cases and as so applied it was valid.¹⁴ However, as the right of removal by plaintiff is withdrawn by the act of 1887, the reference to remand of cases that "may hereafter be entered" in the circuit court, means cases thereafter so entered under the act of 1875.¹⁵ The latter part of the above provision was therefore merely temporary in character and has long ceased to be operative.¹⁶ The first part, directing remand of part of a removed case in certain contingencies, is in full force. The antecedent portions of the second section of the act of 1875 as amended, are contained in an earlier chapter.¹⁷ The final clause is contained in the next following section.¹⁸

§ 1156. Remanding order not appealable.

Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall

¹³See ante, § 136.

¹⁴Birdseye v. Shaeffer, 37 Fed. 821.

¹⁵Campbell v. Collins, 62 Fed. 849.

¹⁶See Fisk v. Henarie, 32 Fed. 417,

¹³Sawy. 38.

¹⁷Ante, §§ 133-136.

¹⁸Post, § 1156.

decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

Last clause of § 2 act Mar. 3, 1875, c. 137, 18 Stat. 470, as amended by act of Mar. 3, 1887, c. 373, § 1, 24 Stat. 552, corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, U. S. Comp. Stat. 1901, p. 510.

The act of 1875 made the remanding order appealable.¹ This clause was added in 1887. The other portions of section two of the act of 1875 are given elsewhere.² Prior to the act of 1875 a remanding order was not appealable because not a final judgment.³ That act gave the right to appeal such an order, but the amendatory act of 1887 withdrew it.⁴ Since then the Supreme Court has no power to review on appeal or error in a direct proceeding for that purpose, an order of a circuit court remanding a cause to a State court,⁵ whether the suit was begun and the removal had before or after said act took effect.⁶ It is not possible to obtain review of the order of remand on writ of error to the State court after final proceedings therein;⁷ nor will the Supreme Court issue mandamus after remand to compel the circuit court to reinstate the cause.⁸ Moreover as a remanding order is not a final judgment, it will not entertain appeal under the clause permitting direct appeal of jurisdictional questions;⁹ nor appeal from a decree of the circuit court of appeals reversing and directing a remand by the circuit court.¹⁰ It results that the remanding order is now absolute in character.

Where the circuit court has refused to remand, its action in that behalf, may be reviewed on appeal from the final judgment or decree in the cause, in the circuit court of appeals or Supreme Court, according as one or the other has the right of review.¹¹ If remand was sought because of mere

¹See ante, § 818, to which section the clause permitting appeal was attached.

²Ante, §§ 133-136, 1155.

³Chicago R. R. v. Wiswall, 23 Wall. 507, 23 L. ed. 103; German Nat. Bank v. Speckert, 181 U. S. 407; 45 L. ed. 926, 21 Sup. Ct. Rep. 689.

⁴See Morey v. Lockhart, 123 U. S. 56, 31 L. ed. 68, 8 Sup. Ct. Rep. 65.

⁵Morey v. Lockhart, 123 U. S. 56, 31 L. ed. 68, 8 Sup. Ct. Rep. 65; Powers v. Chesapeake & Ohio Ry. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Gurnee v. Patrick Co. 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; Whelan v. New York R. Co. 35 Fed. 849.

⁶Wilkinson v. Nebraska, 123 U. S. 286, 31 L. ed. 152, 8 Sup. Ct. Rep.

120; Sherman v. Grinnell, 123 U. S. 679, 31 L. ed. 278, 8 Sup. Ct. Rep. 260.

⁷Whitcomb v. Smithson, 175 U. S. 637, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; Mo. Pac. Railroad v. Fitzgerald, 160 U. S. 556, 48 L. ed. 536, 16 Sup. Ct. Rep. 389.

⁸Ex parte Penn. Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141.

⁹Chicago, etc. Ry. v. Roberts, 141 U. S. 690, 35 L. ed. 905, 12 Sup. Ct. Rep. 123.

¹⁰German Nat. Bank v. Speckart, 181 U. S. 405, 45 L. ed. 926, 21 Sup. Ct. Rep. 689.

¹¹Graves v. Corbin, 132 U. S. 591, 33 L. ed. 462, 10 Sup. Ct. Rep. 193; Cates v. Allen, 149 U. S. 460, 37 L. ed. 804, 13 Sup. Ct. Rep. 883,

286, 31 L. ed. 152, 8 Sup. Ct. Rep. 977; see German Nat. Bank v. Spec-

irregularities in the removal the motion must have been promptly made or its denial will not be reviewed.¹²

§ 1157. Cause to proceed in circuit court as if originally there instituted.

The circuit court of the United States shall, in all suits removed under the provisions of this act,¹⁵ proceed therein as if the suit had been originally commenced in said circuit court,^{[a]-[b]} and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.^[c]

§ 6 of act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 512.

[a] In general.

A clause of similar purport is contained in the third section of the act.¹⁶ There is a similar provision in R. S. § 643 respecting removal of suits against revenue officers.¹⁷ As is elsewhere shown, the jurisdiction of the circuit court attaches upon the filing of proper petition and bond in the State court, in all cases removable under the act of 1875¹⁸ except local prejudice cases;¹⁹ and it is proper to apply to the circuit court for relief, if occasion requires, after the filing of petition and bond prior to the time for filing the record.²⁰

[b] Circuit court to proceed according to its own practice.

A removed case must proceed in the circuit court according to its practice and with due respect to the established Federal distinction between procedure at law and in equity.¹ If the pleadings in the State court present a commingling of legal and equitable matters, not permitted by Federal practice, a replender will be ordered,² and if necessary the parties will be obliged to proceed in two actions.³ Equitable defenses to actions at law are not admissible.⁴ So, if the State court pleadings are

kert, 181 U. S. 405, 45 L. ed. 926, 21 Sup. Ct. Rep. 689.

¹²Martin v. Baltimore R. R. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Missouri P. Ry. v. Fitzgerald, 160 U. S. 558, 40 L. ed. 537, 16 Sup. Ct. Rep. 389; Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

¹⁵See ante, §§ 133-136.

¹⁶See ante, § 1138.

¹⁷Ante, § 1145.

¹⁸See ante, § 1138 [b].

¹⁹As to which see ante, § 1143.

²⁰Ante, § 1139 [b].

¹Thompson v. R. R. Co. 6 Wall.

134, 18 L. ed. 765; Hurt v. Hollingsworth, 100 U. S. 103, 25 L. ed. 569; Wilcox v. Phoenix Ins. Co. 61 Fed. 200.

²Fletcher v. Burt, 126 Fed. 619, 63 C. C. A. 201; Hurt v. Hollingsworth, 100 U. S. 103, 25 L. ed. 569.

³In re Foley, 76 Fed. 390; La-Mothe M. Co. v. National T. Co. 15 Blatchf. 436, Fed. Cas. No. 8,033; see Thorne v. Tonawanda T. Co. 15 Fed. 291.

⁴Northern P. R. R. v. Paine, 119 U. S. 565, 30 L. ed. 513, 7 Sup. Ct. Rep. 323.

equitable while in Federal practice the action must be docketed upon the law side, the court will order the pleadings reformed according to the practice at law.⁵ A cause essentially equitable, according to Federal standards,⁶ must go to the equity side of the Federal court and a law case to the law side.⁷ If the action is really at law no repleader or change will be necessary in the Federal court,⁸ since the practice there is assimilated to that of the State courts.¹⁰ Where there is a joining of legal and equitable grounds for relief or defense, repleader is necessary in view of the distinction maintained by the Federal courts.¹¹ If the action is really equitable, a reformation of the pleadings is not necessary where the form of the pleading substantially conforms to the Federal practice.¹² A stockholder's bill filed in the State court is not governed by the 94th equity rule.¹³ In many districts there are rules of court as to docketing of removed cases and the right to replead.

Subsequent pleadings in the Federal court must conform to its practice;¹⁵ and the circuit court's rule as to time for trial will apply.¹⁶ A plea filed but not determined in the State court will be adjudged in the Federal court by its own rules.¹⁷ Motion to set aside default made but not decided in the State court will be determined by the circuit court.¹⁸ It is usual to move to docket a removed case on the first day of the term, although not required by statute.¹⁹

[c] Prior proceedings in the State court to be respected.

There is an express provision regarding the validity and continuing vigor after removal of attachments, bonds, injunctions or other orders granted by the State court.¹ Where the State court has before removal, and while its jurisdiction existed, decided a demurrer,² or motion to set aside

⁵Coosaw M. Co. v. South Carolina, 144 U. S. 564, 36 L. ed. 537, 12 Sup. Ct. Rep. 689.

⁶See ante, § 935.

⁷Thompson v. Railroad Cos. 6 Wall. 138, 18 L. ed. 765; McConnell v. Prov. L. I. Co. 69 Fed. 113, 16 C. C. A. 172; Perkins v. Hendryx, 23 Fed. 419.

⁸North, etc. Co. v. Orman, 55 Fed. 18, 5 C. C. A. 22; Bills v. New O. R. R. 13 Blatchf. 227, Fed. Cas. No. 1,409; Dart v. McKinney, 9 Blatchf. 359, Fed. Cas. No. 3,583.

¹⁰Ante, § 900.

¹¹Perkins v. Hendryx, 23 Fed. 419; Hurt v. Hollingsworth, 100 U. S. 103, 25 L. ed. 569; Whittenton Co. v. Memphis, etc. Co. 19 Fed. 273; Pilla v. German S. Asso. 23 Fed. 700; Bacon v. Felt, 38 Fed. 873; Phelps v. Elliott, 26 Fed. 881, 23 Blatchf. 470.

¹²Phelps v. Elliott, 26 Fed. 883, 23 Blatchf. 470.

¹³Maeder v. Buffalo, etc. Co. 132 Fed. 280.

¹⁵Henning v. W. U. T. Co. 40 Fed. 658; Falls, etc. Co. v. Broderick, 6 Fed. 654, 2 McCrary 489. But a statutory proceeding removed, is governed in the Federal court at law by the special procedure prescribed by the State law: Broadmoor L. Co. v. Curr, 142 Fed. 421.

¹⁶Knoblock v. Southern Ry. 112 Fed. 926.

¹⁷Kelly v. Virginia Ins. Co. 3 Hughes, 449, Fed. Cas. No. 7, 677.

¹⁸Cady v. Assoc. Col. 119 Fed. 420.

¹⁹Glover v. Shepperd, 15 Fed. 834, 11 Biss. 572.

¹Ante, § 1153.

²Davis v. St. Louis Ry. 25 Fed. 786; Lookout, etc. R. R. v. Houston, 44 Fed. 449.

service of summons,³ or petition for leave to intervene⁴ or other matter,⁵ such decision is entitled to the same respect in the circuit court as one of its own preliminary rulings. If a receivership or other order or injunction was improvidently made or granted the circuit court will modify or set it aside.⁶ In that respect the circuit court's power is the same as over one of its own orders.⁷ It does not review the State court's action but exercises the ordinary power of rehearing.⁸ But it will not enforce an order of the State court such as for physical examination of a party where such order is not permissible by the Federal practice.⁹

Ordinarily the deliberate conclusions of the State court will be adhered to, where there has been no change in the facts or situation of the parties.¹¹ Rulings regarding the sufficiency under the State law of proceedings taken, should be deemed altogether binding.¹² While general appearance in the State court waives defects in service on the person so that after removal the removing party cannot in the circuit court move to quash the service¹³ it is also true that the mere filing of removal petition is not such an appearance as will prevent motion to quash in the circuit court.¹⁴

³Bragdon v. Perkins Co. 82 Fed. 338.

⁴Kidder v. Ins. Co. 117 Fed. 997.

⁵Cleaver v. Traders Ins. Co. 40 Fed. 711; see Brooks v. Farwell, 4 Fed. 166, 2 McCrary 220, and Sutro v. Simpson, 14 Fed. 370, 4 McCrary 276, holding state ruling not convertible.

⁶Texas Railway v. Rust, 17 Fed. 275; 5 McCrary 348; Sharp v. Whiteside, 19 Fed. 156; Sioux, etc. Ry. v. Chicago Ry. 27 Fed. 770; Bertha, etc. Co. v. Carico, 61 Fed. 132; Board of Comrs. v. Pierce, 90 Fed. 764; Coburn v. Cedar, etc. Co. 25 Fed. 791; Portland v. Oregonian Ry. 6 Fed. 321, 7 Sawy. 122.

⁷Bryant v. Thompson, 27 Fed. 881.

⁸Denison v. Shawmut M. Co. 124 Fed. 860.

⁹Ex parte Fisk, 113 U. S. 725, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

¹¹Bryant v. Thompson, 27 Fed. 881; Phelps v. Canada C. R. R. 19 Fed. 801, 20 Blatchf. 450; Bragdon v. Perkins Co. 82 Fed. 338.

¹²Brooks v. Farwell, 4 Fed. 167, 2 McCrary 220; Smith v. Schwed, 6 Fed. 456, 2 McCrary, 441; Leo v. U. P. Ry. 17 Fed. 273.

¹³New York Cons. Co. v. Simon, 53 Fed. 5; see Bentlif v. London, etc. Co. 44 Fed. 667, 668, and cases cited.

¹⁴Wabash W. Ry. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; Cady v. Assoc. Col. 119 Fed. 423; Peterson v. Morris, 98 Fed. 48, ante, § 860 [a].

CHAPTER 34.

PATENT, TRADEMARK AND COPYRIGHT PROCEDURE.

- § 1167. Patent Office and District of Columbia court procedure excluded.
- § 1168. Bill in equity to enforce issue of patent.
- § 1169. Relief against interfering patent and effect of judgment.
- § 1170. Injunction against infringer—damages recoverable.
- § 1171. Action on the case for infringement—damages.
- § 1172. Pleading and proof in actions for infringement.
- § 1173. Jury may be empaneled in equity to try issues of fact.
- § 1174. Suit for infringement where specification of patent too broad.
- § 1175. Recovery by owner of design patent for infringement thereof.
- § 1176. —remedy by existing law not impaired, but owner not to recover twice.
- § 1177. Federal cognizance of trademark infringement cases, how restricted.
- § 1178. Remedies for infringement of trademarks.
- § 1179. —when action not maintainable.
- § 1180. Remedy of one injured by fraudulent registration of trademark.
- § 1181. —existing remedies unimpaired by trademark act.
- § 1182. Injunction in copyright cases.
- § 1183. Injunction against sale, etc., of articles with false copyright notice.
- § 1184. —against infringement of dramatic or unissued composition—procedure.
- § 1185. Effect of plea of general issue in copyright infringement cases.

§ 1167. Patent Office and District of Columbia court procedure excluded.

It is not within the scope of this work to include the statutory provisions respecting the procedure to be followed in obtaining patents, or registering trademarks¹ in the Patent Office, nor in obtaining copyright from the Librarian of Congress.² So also the provisions for appeals to the court of appeals of the District of Co-

¹See R. S. §§ 4883-4910. U. S. Comp. Stat. 1901, pp. 3381-3391.

²See act Mar. 3, 1881, c. 138, 21 Stat. 502. U. S. Comp. Stat. 1901, p. 3401 et seq.

lumbia, from the final Patent Office decision, are excluded because essentially local and applicable only to a local court.³

Author's section.

§ 1168. Bill in equity to enforce issue of patent.

Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof,^[b] on notice to adverse parties and other due proceedings had, may adjudge^[c] that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not.^{a1-[d]}

R. S. §4915, U. S. Comp. Stat. 1901, p. 3392.

[a] History and effect of legislation.

An act of 1836 restricted the remedy by bill in equity to cases of refusal of application because of prior interfering patent.⁶ The remedy was broadened so as to include all refusals, by act of 1829.⁷ That act was superseded by the patent law of 1870, the above provision being based thereon.⁸ Since 1870 and prior to an act of 1892⁹ interference cases were not appealable from the patent office to the Supreme Court of the District of Columbia and hence bill in equity was maintainable forthwith after refusal by the patent office.¹⁰ The act of 1893 made interference cases appealable to the court of appeals of the District. The effect was not to oust the right to bill in equity in such cases;¹¹ But merely to make such appeal a condition precedent.¹²

³See R. S. §§ 4912-4914, act Feb. Stat. 439. U. S. Comp. Stat. 1901, 9, 1893, c. 74, § 9, 27 Stat. 436, U. S. p. 3391.

Comp. Stat. 1901, pp. 3391-3392.

⁶Act July 4, 1836, § 16, 5 Stat. 123.

⁷Act Mar. 3, 1839, § 10, 5 Stat. 354.

⁸Act July 8, 1870, c. 230, § 52, 16 Stat. 205.

⁹Act Feb. 9, 1893, c. 74, § 9, 27

Stat. 439. U. S. Comp. Stat. 1901, p. 3391.

¹⁰Butler v. Shaw, 21 Fed. 321; Ex parte Greeley, 1 Holmes, 284. Fed. Cas. No. 5,745.

¹¹Bernardin v. Northall, 77 Fed. 849.

¹²Smith v. Muller, 75 Fed. 612; see Rein v. Clayton, 37 Fed. 354, 3 L.R.A. 78.

[b] Jurisdiction not restricted to District of Columbia courts.

The section does not limit the jurisdiction of such a bill in equity to courts of the District of Columbia,¹⁵ and the circuit courts have frequently taken jurisdiction of such suits.¹⁶ The only consideration creating practical limitation of the jurisdiction to courts of the District, is the fact of residence there by the Commissioner of Patents and the inability of courts elsewhere to obtain service upon him.¹⁷ Of course he may appear and submit to the jurisdiction of a circuit court elsewhere.¹⁸ But if he does not do so no binding decree can be made against him.¹⁹ In interference cases there is always an opposing party and the commissioner is not a necessary party defendant.²⁰ In such cases therefore, there is no obstacle to suit elsewhere.

[c] Nature, form and effect of the proceeding.

Notwithstanding that bill in equity lies only after appeal to the court of appeals in the District¹ and for the purpose of obtaining a different decision, it is essentially an original and not a revisory proceeding.² The appeal to the court of the District is upon the record in the Patent Office and not strictly judicial in character.³ Whereas the proceeding upon the bill in equity requires an observance of the ordinary rules as to necessary parties,⁴ and testimony is or may be taken independently for purposes of the suit,⁵ and different issues may be raised,⁶ and the decision of the commissioner is not technically superseded.⁷ The decision of the commissioner is, however, entitled to great weight;⁸ although of course not conclusive.⁹ Bill

¹⁵See *Prentiss v. Elsworth Mirror*, Pat. Off. 35, Fed. Cas. No. 11,386, holding contra.

¹⁶See *Vermont Co. v. Marble*, 20 Fed. 117; *Whipple v. Miner*, 15 Fed. 117; *Graham v. Teter*, 25 Fed. 555; *Smith v. Muller*, 75 Fed. 612; *Bernardin v. Northall*, 77 Fed. 849; *Ingersoll v. Holt*, 104 Fed. 682.

¹⁷*Illingworth v. Atha*, 42 Fed. 141, see ante, § 853; *Donnelly v. United States*, 66 Fed. 613.

¹⁸*Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119, 5 Sup. Ct. Rep. 796, 57 L.R.A. 700; *Vermont Co. v. Marble*, 20 Fed. 117.

¹⁹*Illingworth v. Atha*, 42 Fed. 141; *Butterworth v. Hill*, 114 U. S. 128, 29 L. ed. 119, 5 Sup. Ct. Rep. 796.

²⁰*Graham v. Teter*, 25 Fed. 555, per *Bradley, J.*; see *Sawyer v. Massey*, 25 Fed. 144; *Butler v. Shaw*, 21 Fed. 321.

¹Supra note [a].

²*Whipple v. Miner*, 15 Fed. 117; *Atkinson v. Boardman*, Fed. Cas. No. 607; *In re Squire*, Fed. Cas. No.

13,269. But compare *Ex parte Greeley*, 1 Holmes, 284, Fed. Cas. No. 5,745; *Rein v. Clayton*, 37 Fed. 354, 3 L.R.A. 78.

³See *Bernardin v. Northall*, 77 Fed. 851 and cases cited.

⁴See *Gay v. Cornell*, 1 Blatchf. 506, Fed. Cas. No. 5,280; *Graham v. Teter*, 25 Fed. 555.

⁵*Butterworth v. Hoe*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; *Whipple v. Miner*, 15 Fed. 117; *Ex parte Squire*, 3 B. & A. 133, 171, Fed. Cas. No. 13,269; *Atkinson v. Boardman*, Fed. Cas. No. 607.

⁶*Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33.

⁷*Whipple v. Miner*, 15 Fed. 117; *Gandy v. Marble*, 122 U. S. 439, 30 L. ed. 1224, 7 Sup. Ct. Rep. 1292; *In re Hein*, 166 U. S. 439, 41 L. ed. 1069, 17 Sup. Ct. Rep. 627.

⁸*Appleton v. Ecaubert*, 62 Fed. 747.

⁹*Union, etc. Co. v. Crane*, 1 B. & A. 494, Fed. Cas. No. 14,388; *Gloucester Co. v. Brooks*, 19 Fed. 426; *Minneapolis Wks. v. McCormick Co.* 28 Fed. 565.

may not be filed until the patent office proceedings have culminated in appeal to the District court of appeals.¹⁰ Delay in presenting the bill in equity is fatal to the claim unless shown to be unavoidable.¹¹

In interference cases the principal question for decision is that of priority,¹² but the question of patentability may arise in interference as in other cases.¹³ But in an interference case, insufficiency of the specification of the successful applicant cannot be made ground of impeaching such patent.¹⁴ The circuit court cannot issue injunction against the commissioner under this section.¹⁵ It is merely empowered to adjudge whether or not the applicant is entitled to patent.¹⁶ Costs are only required to be awarded as of course, against complainant in cases where there is no opposing party other than the commissioner.¹⁷

§ 1169. Relief against interfering patent and effect of judgment.

Whenever there are interfering patents,^[b] any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity,^{[c]-[d]} may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented.^[e] But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment.

R. S. § 4918, U. S. Comp. Stat. 1901, p. 3394.

[a] In general.

This provision was originally enacted in 1870.² There was an earlier provision in the patent act of 1836.³ It is perhaps the only provision of

¹⁰See *Rein v. Clayton*, 37 Fed. 33 L. ed. 502, 10 Sup. Ct. Rep. 228; 354, 3 L.R.A. 78; *Hoeltge v. Hoeller*, 2 Bond, 386, Fed. Cas. No. 6,574.

¹¹*Gandy v. Marble*, 122 U. S. 439, 30 L. ed. 1224, 7 Sup. Ct. Rep. 1292; *Sawyer v. Massey*, 25 Fed. 144; *Fassett v. Ewart Mfg. Co.* 62 Fed. 407, 10 C. C. A. 441.

¹²*Sawyer v. Massey*, 25 Fed. 144; *Standard Co. v. Peters Co.* 69 Fed. 410; see *Ellithorpe v. Robertson*, 4 Blatchf. 307, Fed. Cas. No. 4,408.

¹³*Hill v. Wooster*, 132 U. S. 693, 123 L. ed. 502, 10 Sup. Ct. Rep. 228; *Leslie v. Tracy*, 100 Fed. 475.

¹⁴*Standard Co. v. Peters Co.* 69 Fed. 408.

¹⁵*Illingworth v. Atha*, 42 Fed. 141.

¹⁶*Gandy v. Marble*, 122 U. S. 432, 30 L. ed. 1223, 7 Sup. Ct. Rep. 1290.

¹⁷*Butler v. Shaw*, 28 Fed. 321.

²Act July 8, 1870, c. 230, § 58, 16 Stat. 207.

³Act July 4, 1836, § 16, 5 Stat. 1094.

law permitting suit by private persons rather than the government for cancellation of its letters patent.⁴ The fact of surrender of patent to obtain a reissue does not oust the right to relief under this section.⁵

[b] What constitutes interference of two patents.

Two patents interfere within this provision only when they claim, in whole or in part, the same invention.⁸ If the claims do not cover the same invention, there is no interference or right to proceed under this provision.⁹ General appearance and functions of a machine, shown but not claimed, are not considered.¹⁰ There is no interference between a patent having a dominant broad claim and a junior patent having a subordinate specific claim.¹¹

[c] Scope of inquiry in such proceedings.

The first question to be determined is that of interference.¹⁴ This is to be determined from the pleadings and proofs and cannot be passed upon on motion for leave to dismiss.¹⁵ If the interference is established, it remains only to inquire which patent has priority.¹⁸ The question of patentability is not involved;¹⁹ nor want of novelty, prior use, or knowledge;²⁰ nor the question of the duration of either patent;¹ unless the bill proceeds also for infringement.² The decision of the patent office is of course not conclusive,³ although admissible and entitled to great weight on the question of priority.⁴ A decree of dismissal in a suit brought under this section is not conclusive as to noninterference, in another suit elsewhere under the same provision.⁵

[d] The mode of procedure.

This section does not authorize service of notice on parties outside the district,⁷ contrary to the settled Federal practice.⁸ The interference must

⁴Mowry v. Whitney, 14 Wall. 434, 20 L. ed. 859; Lockwood v. Cleveland, 20 Fed. 164.

⁵Palmer Co. v. Lozier, 69 Fed. 346.

⁸Gold, etc. Co. v. United States Co. 6 Blatchf. 307, Fed. Cas. No. 5,508.

⁹Nathan Co. v. Craig, 49 Fed. 370; Stonemetz Co. v. Brown Co. 57 Fed. 601.

¹⁰Dederick v. Fox, 56 Fed. 714.

¹¹Morris v. Mfg. Co. 20 Fed. 121; Pentlarge v. Bushing Co. 20 Fed. 314.

¹⁴Morris v. Mfg. Co. 20 Fed. 121.

¹⁵Electric Co. v. Brush Co. 44 Fed. 605.

¹⁸Garratt v. Seibert, 98 U. S. 75, 25 L. ed. 85.

¹⁹Sawyer v. Massey, 25 Fed. 144; Palmer Co. v. Lozier, 84 Fed. 659; American etc. Co. v. Ligowski Co. 31

Fed. 466. Contra: Foster v. Lindsay, 3 Dill. 126, Fed. Cas. No. 4,976.

²⁰Pentlarge v. Pentlarge, 19 Fed. 817; Lockwood v. Cleveland, 20 Fed. 164; Nathan Co. v. Craig, 47 Fed. 522; Electric etc. Co. v. Brush Co. 44 Fed. 602; Stonemetz Co. v. Brown Co. 57 Fed. 601.

¹Electric etc. Co. v. Brush Co. 44 Fed. 602.

²Holliday v. Pickhardt, 29 Fed. 853; Electric etc. Co. v. Brush Co. 44 Fed. 602.

³Hubel v. Tucker, 24 Fed. 702, 23 Blatchf. 297.

⁴Ecaubert v. Appleton, 67 Fed. 917, 15 C. C. A. 73.

⁵Tyler v. Hyde, 2 Blatchf. 308, Fed. Cas. No. 14,309.

⁷Liggett, etc. Co. v. Miller, 1 Fed. 203, 1 McCrary 31.

⁸Ante, § 853.

be denied in the answer, or else is practically admitted.⁹ The proceeding under this section is an independent equity suit and the testimony on interference proceedings before the Commissioner of Patents is not admissible, nor the opinion of the commissioner, as distinguished from his decree.¹⁰ Issues of fact may be submitted to a jury, in the court's discretion.¹¹

[e] The relief granted.

The decree should be direct and affirmative in terms and substantially in the words of the statute.¹² If one patent is found invalid it should be declared void.¹⁴ A party may sue prior patentee for infringement without first obtaining cancellation under this section;¹⁵ or may join a claim for infringement and damages with the claim for relief under this section.¹⁶ Either complainant's patent or that of defendant, may be declared void¹⁷ in the decree; and defendant may have that relief if prayed in his answer though he filed no cross bill.¹⁸ Where cross bill is filed or affirmative relief sought by the answer complainant will not be allowed to dismiss so as to affect injuriously defendant's right.¹⁹

§ 1170. Injunction against infringer—damage recoverable.

The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable;^[b] and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby;^[c]^[d] and the court shall assess the same or cause the same to be assessed under its direction. And the court shall [have] the same power to increase such damages, in its discretion, as is given to increase

⁹Gold, etc. Co. v. United States, 642; American etc. Co. v. Knopp, 44 Co. 6 Blatchf. 307, Fed. Cas. No. Fed. 611.
5,508.

¹⁰Ecaubert v. Appleton, 67 Fed. Co. 31 Fed. 466.
917, 15 C. C. A. 73.

¹¹Ayling v. Hull, 2 Cliff, 494, Fed. Fed. Cas. No. 4,976; Lockwood v. Cleveland, 6 Fed. 721; Gold Co. v. United States Co. 6 Blatchf. 307, Fed. Cas. No. 5,508; Union Co. v. Crane, 6 O. G. 801, Fed. Cas. No. 14,388; Electric, etc. Co. v. Brush Co. 44 Fed. 603. But cross bill is also proper: American, etc. Co. v. Ligowski Co. 31 Fed. 466; Ecaubert v. Appleton, 67 Fed. 917, 15 C. C. A. 73.

¹²Tyler v. Hyde, 2 Blatchf. 308, Fed. Cas. No. 14,309.

¹⁴Foster v. Lindsay, 3 Dill. 126, Fed. Cas. No. 4,976.

¹⁵Western Co. v. Sperry Co. 59 Fed. 295, 8 C. C. A. 129. Compare American etc. Co. v. Knopp, 44 Fed. 611.

¹⁶See Stonemetz Co. v. Brown Co. 57 Fed. 601; Leach v. Chandler, 18 Fed. 262; Swift v. Jenks, 19 Fed. 917, 15 C. C. A. 73; Electric etc. Co. v. Brush Co. 44 Fed. 603.

the damages found by verdicts in actions in the nature of actions of trespass upon the case.^[c] But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action.^{[c]-[e]}

R. S. § 4921, as amended March 3, 1897, c. 391, § 6, 29 Stat. 694, U. S. Comp. Stat. 1901, p. 3395.

[a.] History of legislation.

Prior to 1819 the Federal courts had no jurisdiction over injunction suits for infringement as such but only in cases where diverse citizenship existed.³ An act of that year remedied the defect and provided that the circuit courts "upon any bill in equity, filed by any party aggrieved . . . shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, etc., on such terms and conditions as the said courts may deem fit and reasonable."⁴ That provision was superseded by the patent law of 1836⁵ which was in turn superseded by the law of 1870, upon which latter R. S. § 4921 was based.⁶ The provision permitting decree for damages as well as for infringer's profits was first made in the act of 1870.⁷ The amendment of 1897 consisted in the addition of the final sentence limiting the time for suit. The general rules governing Federal equity practice have already been considered.⁸ Provisions regarding the district where patent infringement suits must be brought,⁹ and the exclusive character of Federal jurisdiction in patent cases¹⁰ are given elsewhere.

[b] When relief in equity may be had.

There are remedies both at law and in equity against an infringer and in many cases the party aggrieved may have his choice between them. R. S. § 4919 authorizes action at law in the nature of an action in the case.¹¹ The above section enables the aggrieved party to resort to remedy by injunction in equity. Yet the permission to resort to equity which it accords is limited to cases where there is not plain, speedy and adequate remedy at

³Livingston v. Van Ingen, 1 Paine, 45, Fed. Cas. No. 8,420. There was jurisdiction over patent cases at law: see Evans v. Eaton, 3 Wheat. 518, 4 L. ed. 448, 449, post, § 1171 [a].

⁴Act Feb. 15, 1819, 3 Stat. 481. See Sullivan v. Redfield, 1 Paine, 441, Fed. Cas. No. 13,597.

⁵Act July 4, 1836, § 17, 5 Stat. 123.

⁶Act July 8, 1870, c. 230, § 55, 16 Stat. 206.

⁷See Birdsall v. Coolidge, 93 U. S. 69, 23 L. ed. 802; Root v. Railroad, 105 U. S. 201, 212, 26 L. ed. 975.

⁸Ante, § 935 et seq.

⁹Ante, § 416.

¹⁰Ante, 15.

¹¹Post, § 1171.

law.¹⁴ If the injured party seeks only damages and profits he may not resort to equity upon the theory of holding the infringer to an accounting as an involuntary trustee.¹⁵ Action for damages and profits and not for injunction, can only be sustained in equity in case of exceptional circumstances that would render the legal remedy for damages inadequate relief for the wrongs complained of;¹⁶ or where the right sued on is incidental to some other right only cognizable in equity;¹⁷ or upon some other general equity ground such as multiplicity of suits.¹⁸ The fact that an assignee of a patent cannot sue in his own name,¹⁹ will not, however, furnish the necessary equity.

But usually the right to go into equity depends upon the existence of right to an injunction.²⁰ As injunction is generally the only adequate remedy against an infringer in the case of unexpired patent, it follows that in such case the aggrieved party may, in general, sue in equity for injunction profits and damages.¹ The fact that patent has expired pending suit will not oust the jurisdiction of the court of equity to proceed to decree as to damages and profits. Upon the other hand if the patent rights of an aggrieved party have expired, the only remedy open to the party is action of damages at law;² unless some ground of equity jurisdiction exists outside this statute. So also if the patent rights are alive but there is no equitable right to injunction, because the writ will not lie against the sovereign,³ or for other reason; or the patent will expire before injunction can issue,⁴ the party must be remitted to his remedy at law. If patent is about to expire a court of equity may take or refuse jurisdiction in its discretion;⁵ and while it may not grant injunction in its final decree if patent has expired while the suit is pending, it may enter for profits and damages.⁶

¹⁴Root v. Railroad Co. 105 U. S. 216, 26 L. ed. 975; Brick v. Staten 205, 26 L. ed. 975.

¹⁵Root v. Railroad Co. 105 U. S. 205, 26 L. ed. 975; Hayward v. Andrews, 106 U. S. 678, 27 L. ed. 271, 1 Sup. Ct. Rep. 546; Woodmanse Co. v. Williams, 68 Fed. 493, 15 C. C. A. 520; Truman v. Holmes, 87 Fed. 744, 31 C. C. A. 215.

¹⁶Root v. Railroad Co. 105 U. S. 216, 26 L. ed. 975.

¹⁷Root v. Railroad Co. 105 U. S. 216, 26 L. ed. 975; Rogers v. Reissner, 30 Fed. 530.

¹⁸Hat Sweat M. Co. v. Porter, 34 Fed. 747.

¹⁹Hayward v. Andrews, 106 U. S. 675, 27 L. ed. 272, 1 Sup. Ct. Rep. 546.

²⁰Root v. Railroad Co. 105 U. S. 189, 26 L. ed. 975; Woodmanse Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520; Merriam v. Smith, 11 Fed. 588.

¹Root v. Railroad, 105 U. S. 190. 216, 26 L. ed. 975; Bragg v. Stockton, 27 Fed. 509; Brooks v. Miller, 28 Fed. 617; Henzel v. Cal. Elect. Wks. 48 Fed. 375, 51 Fed. 754, 2 C. C. A. 495.

²Root v. Railroad, 105 U. S. 190, 216, 26 L. ed. 975; Keyes v. Eureka Co. 158 U. S. 154, 39 L. ed. 930, 15 Sup. Ct. Rep. 773; Vaughan v. Central Pac. R. R. Co. 4 Sawy. 280, Fed. Cas. No. 16,897.

³Belknap v. Schild, 161 U. S. 11, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

⁴Burdell v. Comstock, 15 Fed. 395; Davis v. Smith, 19 Fed. 823; Hewitt v. Pennsylvania Co. 24 Fed. 367; Ross v. Ft. Wayne, 58 Fed. 404; Russel v. Kern, 69 Fed. 94, 16 C. C. A. 154; Davis v. Smith, 19 Fed. 823.

⁵Clark v. Wooster, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 218.

⁶Clark v. Wooster, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 218;

Berdle v. Bennett, 122 U. S. 75, 30

[c] Recovery of infringer's profits

Where the right to injunction exists a court of equity may proceed to administer full relief, deciding all incidental questions and awarding damages and profits.⁹ Prior to the act of 1870 equity could only award infringer's profits to the complaint.¹⁰ This meant and still means the profits actually realized and not what might have been realized by better management;¹¹ and the profits accruing to defendant and not to another.¹² The court has no power to give judgment trebling the profits as in case of damages at law.¹³ It is further settled that in case of infringement in a process or by the use of a patented article the profits are measured by the advantage whether in the form of gains or profits, or otherwise, defendant has thereby acquired.¹⁴ And if patentee cannot show an absolute advantage secured through the use of his patent over other modes or devices in unrestricted use, he can recover no profits.¹⁵ While if an article or product derives its entire value from the use of a patent, the entire profit may be recovered.¹⁶ So where the infringed patent is for an improvement or a unit in a combination¹⁷ the profits to be ascertained and allowed are only those due to the improvement;¹⁸ and the burden is on complainant to show the portion of the profits due him.¹⁹ Where a patent for a carpet design is infringed the entire profit on the carpet should only be allowed where it resulted from such patented design.²⁰ In the absence of special circumstances, profits allowed in recovery do not bear interest

L. ed. 1076, 7 Sup. Ct. Rep. 1092; *Dick v. Strather*, 25 Fed. 103; *Kirk v. DuBois*, 28 Fed. 461; *Lake Shore Ry. v. National Car-Brake Co.* 110 U. S. 230, 28 L. ed. 129, 4 Sup. Ct. Rep. 33.

⁹*Root v. Railroad*, 105 U. S. 205, 26 L. ed. 975; *Merriam v. Smith*, 11 Fed. 588.

¹⁰*Livingston v. Woodworth*, 15 How. 560, 14 L. ed. 809.

¹¹*Dean v. Mason*, 20 How. 203, 15 L. ed. 876; *Burdell v. Denig*, 92 U. S. 720, 23 L. ed. 764; *Tilghman v. Proctor*, 125 U. S. 147, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Coupe v. Royer*, 155 U. S. 583, 39 L. ed. 263, 15 Sup. Ct. Rep. 199.

¹²*Belknap v. Schild*, 161 U. S. 26, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

¹³*Court v. Sargent*, 42 Fed. 298.

¹⁴*Mowry v. Whitney*, 14 Wall. 651, 20 L. ed. 860; *Cawood Patent*, 94 U. S. 710, 24 L. ed. 238; *Manufacturing Co. v. Cowing*, 105 U. S. 255, 26 L. ed. 987; *Tilghman v. Proctor*, 125 U. S. 146, 31 L. ed. 664, 8 Sup. Ct. Rep. 894. See *Sessions v. Romadka*, 145 U. S. 45, 36 L. ed. 616, 12 Sup. Ct. Rep. 799, where patented device was used on articles sold.

¹⁵*Calkins v. Bertrand*, 8 Fed. 759; *Coupe v. Weatherhead*, 37 Fed. 17; *Shannon v. Boner*, 33 Fed. 872; *Webster L. Co. v. Higgins*, 43 Fed. 676; *Locomotive T. Co. v. Penn. Ry.* 2 Fed. 679; *Everest v. Buffalo O. Co.* 31 Fed. 745; *Tuttle v. Claplin*, 76 Fed. 233, 22 C. C. A. 138.

¹⁶*Hurlburt v. Schillinger*, 130 U. S. 472, 32 L. ed. 1011, 9 Sup. Ct. Rep. 584; *Crosby Co. v. Consolidated Co.* 141 U. S. 454, 35 L. ed. 809, 12 Sup. Ct. Rep. 49.

¹⁷*Jones v. Morehead*, 1 Wall. 164, 17 L. ed. 662.

¹⁸*Garrettson v. Clark*, 111 U. S. 121, 28 L. ed. 371, 4 Sup. Ct. Rep. 291; *McCreary v. Penn. C. Co.* 141 U. S. 463, 35 L. ed. 817, 12 Sup. Ct. Rep. 40.

¹⁹*Elgin Co. v. Nichols*, 105 Fed. 782; *Dobson v. Dorman*, 118 U. S. 18, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

²⁰*Dobson v. Hartford C. Co.* 114 U. S. 444, 29 L. ed. 177, 6 Sup. Ct. Rep. 946. Compare *Dodson v. Dorman*, 118 U. S. 15, 16, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

until after their amount has been judicially ascertained,¹ by filing of the master's report.²

[d] Damages as well as profits recoverable.

Since only actual profits were recoverable in equity, prior to the act of 1870, and not damages, the consequence was that a patentee's right to compensation for a wrong done might be destroyed by the fault or mismanagement of the infringer, and the act of 1870 was intended to correct that injustice in the law.⁶ Since that act, if the profits do not adequately compensate complainant or the injury is greater than such profits, the court may in addition award damages,⁷ assessing them itself or directing such assessment,⁸ and with power to increase the damages assessed as in the case of verdicts.⁹ It is proper to award compensatory damages where infringer's business was so improvidently conducted that it yielded no profits.¹⁰ The damages referred to by this section are the same as those recoverable at law in action on the case.¹¹ They represent what plaintiff has lost by the infringement and not infringer's profits.¹² Plaintiff must offer affirmative proof which can be made the basis of reckoning his damages or only nominal damages will be awarded.¹³ Reduction in market price of the patentee's articles due to infringer's competition is a proper item of damages,¹⁴ but if plaintiff fails to show to what extent the reduction was compelled by infringer's competition only nominal damages can be awarded.¹⁵ Counsel fees are not allowable as damages.¹⁶

[e] Power to increase damages.

This section does not empower the court to increase the profits found but only the damages where allowed.²⁰ Damages in equity are assessed by the court or under its direction and may be increased as in the case of action at law.¹

¹Silsby v. Foote, 20 How. 386, 15 L. ed. 953; Mowry v. Whitney, 14 Wall. 653, 20 L. ed. 860; Littlefield v. Perry, 21 Wall. 230, 22 L. ed. 377; Tilghman v. Proctor, 125 U. S. 161, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Parkes v. Booth, 102 U. S. 106, 26 L. ed. 54.

²Crosby Co. v. Consolidated Co. 141 U. S. 458, 35 L. ed. 809, 12 Sup. Ct. Rep. 49.

⁶See Birdsall v. Coolidge, 93 U. S. 69, 23 L. ed. 802.

⁷Birdsall v. Coolidge, 93 U. S. 69, 23 L. ed. 802; Coupe v. Royer, 155 U. S. 582, 39 L. ed. 263, 15 Sup. Ct. Rep. 199.

⁸Dobson v. Hartford C. Co. 114 U. S. 443, 29 L. ed. 177, 5 Sup. Ct. Rep. 945.

⁹Ibid.

¹⁰Marsh v. Seymour, 97 U. S. 360, 24 L. ed. 963.

¹¹Bancroft v. Acton, 7 Blatchf. 505, Fed. Cas. No. 833; see post. § 1171 [e].

¹²Coupe v. Royer, 155 U. S. 582, 39 L. ed. 263, 15 Sup. Ct. Rep. 199; Wooster v. Trowbridge, 115 Fed. 722.

¹³Cornely v. Marckwald, 131 U. S. 161, 33 L. ed. 117, 9 Sup. Ct. Rep. 744.

¹⁴Yale Lock Co. v. Sargent, 117 U. S. 552, 29 L. ed. 954, 6 Sup. Ct. Rep. 931.

¹⁵Cornely v. Marckwald, 131 U. S. 161, 33 L. ed. 117, 9 Sup. Ct. Rep. 744; Dobson v. Dorman, 118 U. S. 16, 17, 30 L. ed. 63, 6 Sup. Ct. Rep. 946.

¹⁶Bancroft v. Acton, 7 Blatchf. 505, Fed. Cas. No. 833.

²⁰Covert v. Sargent, 42 Fed. 298.

¹Dobson v. Hartford C. Co. 114 U. S. 443, 29 L. ed. 177, 5 Sup. Ct. Rep. 945.

[f] Laches in bringing suit.

Prior to the amendment of 1897 adding the six year limitation sentence to the foregoing section, laches of complainant in suing for infringement led to a presumption of acquiescence in the infringement and was a recognized ground for refusing relief.⁴ So knowledge of infringement and long continued acquiescence therein has often been held to warrant refusal of a preliminary injunction;⁵ though if the infringement was clear injunction has issued even where past profits were not allowed because of the laches.⁶ And while poverty of complainant⁷ or loss of the patents⁸ or delay in suit until it could be brought in a convenient district⁹ have been held not to excuse laches, delay in bringing suit has been held no ground for refusing relief where complainant has been prosecuting another infringement suit;¹⁰ or has been negotiating during the interim;¹¹ or has given notice and warning;¹² or has been ignorant of the infringement and its extent;¹³ or has not deemed the infringement harmful;¹⁴ or has been unable to find any solvent infringer.¹⁵ The statute of limitations at law is usually followed by analogy and laches will not be imputed in advance of the running of the statute at law where there are no grounds such as deceit creating an equitable estoppel against the patentee.¹⁶

[g] Limitation of six years as to profits and damages recoverable.

The applicability of the last clause of the section to a case pending at the time of its adoption has been sustained.¹⁸ It does not make six years delay a bar to infringement proceedings, and hence the right to injunction against an infringer is still determined by the equitable rule of laches and the doctrine of acquiescence or equitable estoppel.¹⁹

⁴Leggett v. Standard O. Co. 149 U. S. 294, 37 L. ed. 737, 13 Sup. Ct. Rep. 902; Lane, etc. Co. v. Locke, 150 U. S. 200, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78; Keyes v. Eureka M. Co. 158 U. S. 153, 39 L. ed. 929, 15 Sup. Ct. Rep. 772; Merriam v. Smith, 11 Fed. 588.

⁵Mundy v. Kendall, 23 Fed. 592; Keyes v. Smelting Co. 31 Fed. 560; Taylor v. Spindle Co. 75 Fed. 303. 22 C. C. A. 205; Daniel v. Miller, 81 Fed. 1000.

⁶McLean v. Fleming, 96 U. S. 445, 24 L. ed. 828; Taylor v. Sawyer Co. 75 Fed. 303, 304, and cases cited.

⁷Leggett v. Standard Oil Co. 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. Rep. 902.

⁸Cooper v. Matthews, 3 Pa. L. J. 178. Fed. Cas. No. 3,200.

⁹Ballou S. Co. v. Dizer, 5 B. & A. 540. 85 Fed. 864.

¹⁰Van Hook v. Pendleton. 1 Blatchf. 193, Fed. Cas. No. 16,851; Green v. Barney, 19 Fed. 420; Amer-

ican T. Co. v. Southern T. Co. 34 Fed. 795; Edison Co. v. Sawyer Co. 53 Fed. 592, 3 C. C. A. 605; Taylor v. Sawyer, etc. Co. 75 Fed. 301, 303; New York Co. v. Loomis, etc. Co. 91 Fed. 421; American P. T. Co. v. Pratt Co. 106 Fed. 229.

¹¹National, etc. Co. v. Heeler, 77 Fed. 462.

¹²Collignon v. Hayes, 8 Fed. 912; Concord v. Norton, 16 Fed. 477; Kittle v. Hall, 29 Fed. 509; Bradford v. Belknap M. Co. 105 Fed. 63.

¹³Van Hook v. Pendleton, 1 Blatchf. 193, Fed. Cas. No. 16,851; Imperial Co. v. Stein, 77 Fed. 612, 23 C. C. A. 353; Kittle v. Hall, 29 Fed. 508.

¹⁴Accumulator Co. v. Edison, etc. Co. 63 Fed. 979.

¹⁵Huntington D. P. Co. v. Newell, Co. 91 Fed. 661.

¹⁶Ide v. Trorlicht, 115 Fed. 148, 53 C. C. A. 341.

¹⁸American P. T. Co. v. Pratt & C. 106 Fed. 229.

¹⁹Supra, note [f].

§ 1171. Action on the case for infringement—damages.

Damages for the infringement of any patent may be recovered by action on the case,^[a] in the name of the party interested,^[a] either as patentee, assignee, or grantee.^[c] And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.^{[e]-[h]}

R. S. § 4919 U. S. Comp. Stat. 1901, p. 3394.

[a] History of legislation.

The provision was carried forward into the revised statutes from an act of 1870.³ The earliest provision upon the subject was contained in an act of 1790 which made an infringer liable to "forfeit and pay to the patentee such damages as should be assessed by a jury; and, moreover, to forfeit to the person aggrieved, the infringing machine." The next law was an act of 1793, declaring that "if any person shall make, devise and use, or sell" the thing patented without right or license, etc., "every person so offending shall forfeit and pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed to other persons the use of the said invention; which may be recovered in an action on the case founded on this act, in the circuit court of the United States, or any other court having competent jurisdiction."⁵ This was amended in 1800 to reach any person who should "make, devise, use or sell,"⁶ and compelled the infringer "to forfeit and pay to the patentee a sum equal to three times the actual damages sustained by such patentee." The next act was passed in 1836⁷ and that provided for a verdict by the jury, if plaintiff was successful, for "actual damages," but permitted the court to increase the amount of the verdict to the extent of trebling it, if in the opinion of the court, defendant had not acted in good faith, or had been stubbornly litigious, or had caused unnecessary expense and trouble to the plaintiff. This remedied the hardship of the inflexible provision as to damages in the act of 1800.⁸ The act of 1836 also introduced the provision for suit by the persons interested whether as patentee, assignee or grantee.⁹ The act of 1836 was superseded by the present law.

³Act July 8, 1870, c. 230, § 59, 16 Stat. 207.

⁵Act Feb. 21, 1793, § 5, c. 11, 1 Stat. 318. See *Tyler v. Tule*, 6 Cranch, 324, 3 L. ed. 237.

⁶April 17, 1800, § 3, c. 25, 2 Stat. 37. See *Whittemore v. Cutter*, 1 Gill. 429, Fed. Cas. No. 17,600.

⁷Act July 4, 1836, § 14, 5 Stat. 123.

⁸*Seymour v. McCormick*, 16 How. 488, 14 L. ed. 1027.

⁹*Moore v. Marsh*, 7 Wall. 515, 18 L. ed. 39.

[b] Nature and form of the action.

While a party aggrieved by infringement has not always a remedy in equity,¹² the remedy by action at law for damages in the nature of an action on the case is broader and always open. The procedure in actions at law in the Federal courts is required by R. S. § 914 to conform "as near as may be" to the local State practice,¹³ and that requirement applies to patent infringement suits except in so far as positive provisions of Federal law demand a deviation therefrom. The provision of the above section for "action on the case" sometimes necessitates a deviation from local rules of practice;¹⁴ and the declaration must be substantially in the form of an action on the case¹⁵ regardless of the local practice. On the other hand if the local law gives a form of pleading that is substantially an action on the case, though not the precise common law form, R. S. § 914 requires that it be followed.¹⁶ The gravamen of the complaint is the tortious conduct of defendant and it is proper to conclude with a demand of damages in gross.¹⁷

[c] Parties competent to sue—assignee, grantee, and licensee.

The patent laws permit assignment of a patent or interest therein and further permit patentee or his assignee to grant and convey an exclusive right under the patent throughout any specified part of the United States. Such assignments and grants must be recorded. The courts have decided that the assignments and grants thus provided for by the statute are such only as transfer an entire patent or patent right, or undivided part thereof, or the entire interest of the patentee or undivided part thereof within and throughout a certain specified portion of the United States.²⁰ The words "assignee, or grantee," in the above section are to be understood as referring to parties holding assignments and grants in the above sense.¹ They do not comprehend a mere licensee, nor permit him to sue in his own name for infringement,² unless it is his grantor or assignor who has infringed.³ An assignee is one who has transferred to him in writing the whole interest in the patent or an undivided part of such whole interest in every portion of the United States.⁴ A grantee is one having the exclusive right (excluding the patentee as well as others) under the patent to make and use, and grant to others to make and use, the thing patented within and

¹²See ante § 1170 [b].

¹³Ante, § 900.

¹⁴Ante, § 900 [f].

¹⁵May v. Mercer Co. 30 Fed. 246; Myers v. Cunningham, 44 Fed. 346.

¹⁶Celluloid Co. v. Zyllonite Co. 34 Fed. 744. Compare post, § 1185.

¹⁷Wilder v. McCormick, 2 Blatchf. 31 Fed. Cas. No. 17650.

²⁰Littlefield v. Perry, 21 Wall. 222, 22 L. ed. 578; Pope M. Co. v. Gormulley M. Co. 144 U. S. 250, 36 L. ed. 423, 12 Sup. Ct. Rep. 641.

¹Littlefield v. Perry, 21 Wall. 222, 22 L. ed. 578.

²Gayler v. Wilder, 10 How. 494, 13 L. ed. 504; Potter v. Holland, 4 Blatchf. 206, Fed. Cas. No. 11329; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 579; Paper B. Co. v. Nixon, 105 U. S. 771, 26 L. ed. 959; Birdsell v. Shaliol, 112 U. S. 486, 22 L. ed. 768, 5 Sup. Ct. Rep. 244.

³Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 579; Waterman v. Shipman, 55 Fed. 982, 5 C. C. A. 371.

⁴Potter v. Holland, 4 Blatchf. 206,

throughout some specified part or portion of the United States.⁵ A licensee is one who has transferred to him in writing or orally, a less or different interest than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest.⁶ If the party has less than an unqualified monopoly he is a mere licensee.⁷

[d] Who are persons interested.

"Party interested" within the above section means the person or persons interested in the patent at the time when the infringement occurred, and does not permit an assignee to sue for an infringement committed before he had acquired any interest;⁹ nor permit patentee to sue for infringements after a transfer of his whole interest.¹⁰ An assignee retaining an interest in the patent, but none in the particular territory in question may join with his grantee to restrain infringement.¹¹ But a grantee or assignee may sue alone.¹² When the assignment is of an undivided part of the whole interest both assignor and assignee should join in the suit.¹³ A licensee should not be joined as plaintiff with the patentee or assignee unless he is an exclusive licensee.¹⁴ But an exclusive licensee may be joined;¹⁵ and an exclusive licensee may join the patentee as co-plaintiff against his consent and appeal alone if the patentee will not join.¹⁶ A partner of patentee should not join with him if not actually part owner.¹⁷ The fact that assignees are trustees for part of the profits¹⁸ or that a clause provides for reversion for nonpayment,¹⁹ will not destroy assignees statutory interest. Nor is a patentee's or assignee's interest destroyed by

- Fed. Cas. No. 11,329; *Meyer v. Bailey*, 2 Barn. & A. 73, Fed. Cas. No. 9,516; *Clement M. Co. v. Upson* Co. 40 Fed. 472. See *Wilson v. Rensseau*, 4 How. 686, 11 L. ed. 1141.
- ⁵*Potter v. Holland*, 4 Blatchf. 206, Fed. Cas. No. 11,329; *Rice v. Boss*, 46 Fed. 196; *Meyer v. Bailey*, 2 Barn. & A. 73, Fed. Cas. No. 9,516.
- ⁶*Potter v. Holland*, 4 Blatchf. 206, Fed. Cas. No. 11,329; *Clement M. Co. v. Upson*, 40 Fed. 472; *Jones v. Berger*, 58 Fed. 1007; *Union etc. Co. v. Johnson Co.* 61 Fed. 944, 10 C. C. A. 176.
- ⁷*Gayler v. Wilder*, 10 How. 494, 13 L. ed. 504.
- ⁹*Moore v. Marsh*, 7 Wall. 515, 19 L. ed. 39.
- ¹⁰*Albright v. Teas*, 106 U. S. 617, 27 L. ed. 295, 1 Sup. Ct. Rep. 550.
- ¹¹*Woodworth v. Wilson*, 4 How. 716, 11 L. ed. 1171.
- ¹²*Moore v. Marsh*, 7 Wall. 520, 19 L. ed. 37; *Blanchard v. Putnam*, 8 Wall. 423, 19 L. ed. 433; *Waterman v. Mackenzie*, 138 U. S. 255, 257, 34 L. ed. 923, 11 Sup. Ct. Rep. 334.
- ¹³*Moore v. Marsh*, 7 Wall. 520, 521, 19 L. ed. 37; *Waterman v. Mackenzie*, 138 U. S. 255, 257, 34 L. ed. 923, 11 Sup. Ct. Rep. 334; *Pope M. Co. v. Gormully M. Co.* 144 U. S. 251, 36 L. ed. 423, 12 Sup. Ct. Rep. 641.
- ¹⁴*Blair v. Lippincott G. Co.* 52 Fed. 226.
- ¹⁵*Blair v. Lippincott G. Co.* 52 Fed. 227; *Birdsell v. Shaliol*, 112 U. S. 489, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; *Sharples v. Moseley M. Co.* 75 Fed. 595; *Clement M. Co. v. Upson*, 40 Fed. 471.
- ¹⁶*Excelsior W. P. Co. v. Seattle*, 117 Fed. 144, 55 C. C. A. 156 and cases cited.
- ¹⁷*Yale L. Co. v. Sargent*, 117 U. S. 552, 29 L. ed. 954, 6 Sup. Ct. Rep. 934.
- ¹⁸*Rude v. Wescott*, 130 U. S. 163, 32 L. ed. 838, 9 Sup. Ct. Rep. 463.
- ¹⁹*Boesch v. Graff*, 133 U. S. 701, 33 L. ed. 787, 10 Sup. Ct. Rep. 378.

bankruptcy.²⁰ After patentee's death his personal representatives may maintain suit for infringement.¹

[e] Damages recoverable in general.

Since the act of 1836, the jury is only empowered to award actual damages, and it is for the court to increase them where proper.⁵ This provision excludes any award by the jury of exemplary or speculative damages;⁶ or award of damages for infringement of another patent not made the basis of suit;⁷ or for any other than the claims specified.⁸ Damages must be proved and not left to conjecture.⁹ They will not be presumed.¹⁰ Hence if plaintiff fails to furnish proof from which actual damages can be reckoned, he can only recover nominal damages.¹¹ When the infringement is of a device which is only part of a machine, plaintiff has the burden of showing how much is due to that part.¹² At law the measure of damages is not the profits made by defendant.¹³ The measure is what plaintiff has lost and not what defendant has gained;¹⁴ although the profits of defendant may be taken into account where there is no established license or royalty or other satisfactory test.¹⁵

[f] — royalty and license.

The customary measure of damages in actions at law for infringement is the amount fixed by plaintiff for royalties or sale of licenses.¹⁸ Having himself fixed the price for royalty or license plaintiff cannot recover more

²⁰*Sessions v. Romedka*, 145 U. S. 52, 36 L. ed. 609, 12 Sup. Ct. Rep. 799.

¹*Illinois R. R. v. Turrill*, 110 U. S. 303, 28 L. ed. 154, 4 Sup. Ct. Rep. 5.

⁵See *supra*, note [a]. *Seymour v. McCormick*, 16 How. 488, 14 L. ed. 1027; *Birdsall v. Coolidge*, 93 U. S. 64, 69, 23 L. ed. 802.

⁶*Tilghman v. Proctor*, 125 U. S. 143, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Rude v. Wescott*, 130 U. S. 167, 32 L. ed. 888, 9 Sup. Ct. Rep. 463.

⁷*McCreary v. Pennsylvania Co.* 141 U. S. 465, 35 L. ed. 817, 12 Sup. Ct. Rep. 40.

⁸*Le Roy v. Tatham*, 14 How. 176, 14 L. ed. 367.

⁹*Philp v. Nock*, 17 Wall. 462, 21 L. ed. 679; *Lee v. Pillsbury*, 49 Fed. 747.

¹⁰*Blake v. Robertson*, 94 U. S. 733, 24 L. ed. 245.

¹¹*New York v. Ransom*, 23 How. 489, 16 L. ed. 517; *Blake v. Robertson*, 94 U. S. 734, 24 L. ed. 245; *Dobson v. Doman*, 118 U. S. 16, 17, 30 L. ed. 63, 6 Sup. Ct. Rep. 946; *Corney v. Marckwald*, 131 U. S. 161, 33 L. ed. 117, 9 Sup. Ct. Rep. 744.

¹²*Keystone M. Co. v. Adams*, 151 U. S. 147, 38 L. ed. 103, 14 Sup. Ct. Rep. 295; *Warren v. Keep*, 155 U. S. 268, 39 L. ed. 144, 15 Sup. Ct. Rep. 83.

¹³*Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296.

¹⁴*Cowing v. Rumsey*, 8 Blatchf. 36, Fed. Cas. No. 3,296; *Atwood v. Portland Co.* 10 Fed. 285; *Royer v. Schultz*, 45 Fed. 52; *Lee v. Pillsbury*, 49 Fed. 747.

¹⁵*Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024; *Philp v. Nock*, 17 Wall. 460, 21 L. ed. 679; *Burdell v. Denig*, 92 U. S. 720, 23 L. ed. 767; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799.

¹⁸*Packet Co. v. Sickles*, 19 Wall. 617, 22 L. ed. 203; *Burdell v. Denig*, 92 U. S. 720, 23 L. ed. 764; *Birdsall v. Coolidge*, 93 U. S. 70, 23 L. ed. 802; *Black v. Thome*, 111 U. S. 124, 28 L. ed. 372, 4 Sup. Ct. Rep. 326; *Star etc. Co. v. Crossman*, 4 Barn. & A. 566, Fed. Cas. No. 13,320.

without clear proof of greater loss.¹⁹ But there must have been some actual sales of licenses sufficient to establish a regular price;²⁰ or some customary and established royalty charge paid or secured before the infringement, by such a number as to indicate general acquiescence in its reasonableness.¹ The circumstances must have been fairly similar.² Payments in settlement of alleged infringements and settlements as to fees after discontinuance of license are not evidence of value; nor are the conjectural statements of witnesses made without knowledge of the saving accomplished by a machine.³ A royalty for the whole monopoly is not sufficient evidence of the value of the right to make occasional sales.⁴ So if a patented improvement has been used only a short time a license fee may not be the proper measure of damages.⁵ The price for which patent rights in one territory are sold will not determine the damages sustained elsewhere.⁶ Royalty to use is not evidence of damages sustained by sale.⁷ The license fee for one improvement will not determine the damages for infringement of another.⁸ Nor will the license fee for all measure the damage by infringement of a part;⁹ and unless the plaintiff shows the proportion due to the infringed device;¹⁰ or that the parts not infringed are merely of nominal value;¹¹ he can recover only nominal damages.

[g]—in absence of royalty or license.

In the absence of established royalty or license fee, which may be made the test,¹⁴ the jury must determine what will compensate plaintiff for the injury from general evidence.¹⁵ Evidence as to the utility and advantage of the invention over the old modes or devices in use would seem appro-

¹⁹Seymour v. McCormick, 16 How. 490, 14 L. ed. 1024.

²⁰Rude v. Wescott, 130 U. S. 165, 32 L. ed. 888, 9 Sup. Ct. Rep. 463; Adams v. Bellaire Co. 28 Fed. 360; Royer v. Schultz B. Co. 45 Fed. 51.

¹Rude v. Wescott, 130 U. S. 165. 32 L. ed. 888, 9 Sup. Ct. Rep. 463; Proctor v. Brill, 4 Fed. 415; Hunt Co. v. Cassidy, 64 Fed. 585, 12 C. C. A. 316; Vulcanite Co. v. American A. Co. 36 Fed. 378.

²Colgate v. Western E. Co. 28 Fed. 146.

³Rude v. Wescott, 130 U. S. 166, 32 L. ed. 888, 9 Sup. Ct. Rep. 463.

⁴Colgate v. Western E. Co. 28 Fed. 147.

⁵Seymour v. McCormick, 16 How. 490, 14 L. ed. 1028; Keller v. Stolzenbaugh, 43 Fed. 378.

⁶Campbell v. Barelay, 5 Biss. 179. Fed. Cas. No. 2,353.

⁷Colgate v. Western Co. 28 Fed. 147.

⁸La Baw v. Hawkins, 2 B. & A. 561, Fed. Cas. No. 7,961.

⁹Birdsall v. Coolidge, 93 U. S. 64, 23 L. ed. 802; Wooster v. Simonson, 16 Fed. 680; Hunt Co. v. Cassidy, 53 Fed. 261, 3 C. C. A. 525 and cases cited.

¹⁰Porter N. Co. v. National N. Co. 22 Fed. 829; Moffitt v. Cavanagh, 27 Fed. 511; Williams v. McNeely, 77 Fed. 894; Robbins v. Illinois W. Co. 81 Fed. 957, 27 C. C. A. 21.

¹¹Dobson v. Hartford Co. 114 U. S. 445, 29 L. ed. 177, 5 Sup. Ct. Rep. 945; Asmus v. Freeman, 34 Fed. 902; Willimantic Co. v. Clark T. Co. 27 Fed. 865.

¹⁴If that test exists it is error to resort to evidence of utility. Washington, etc. Co. v. Sickles, 19 Wall. 617, 22 L. ed. 204.

¹⁵Suffolk Mfg. Co. v. Hayden, 3 Wall. 320, 18 L. ed. 76, 78; Judson v. Bradford, 3 Ban. & A. 539 Fed. Cas. No. 7564; Wooster v. Thornton. 26 Fed. 276; Lee v. Pillsbury, 49 Fed. 747.

propriate in such a case,¹⁶ at least where there was some evidence of actual loss or damage. So also is evidence of the saving to infringer by use of the device or process.¹⁷ Evidence as to the loss caused by defendant's competition is often a guide in such cases;¹⁸ and evidence of defendant's profits sometimes affords a clue to plaintiff's loss.¹⁹ Profits which plaintiff might fairly expect to make but for the infringement are sometimes a guide;²⁰ though the profit measured is that on the patent itself and not manufacturing profit.¹ Exceptional contracts may be taken as a basis for calculation in such cases.² In suit for infringement by use of a patent the jury may be asked to determine what would constitute a reasonable royalty in view of the utility and cheapness of the invention as compared with other available substitutes;³ provided evidence upon the point has been offered.⁴ If no royalty or license fee be shown, no market price, no actual damage, no other use of the patent device than that by defendant, there is no basis for awarding more than nominal damages.⁵ If plaintiff fails to show actual advantage to defendant from the use of his device or if his device is impracticable, he can recover only nominal damages.⁶

[h] — increase of damages by court.

An increase in the damages by the court is a matter of discretion;⁷ to be allowed only on a satisfactory showing;⁸ and to be refused usually unless the case is one of exceptional hardships.⁹ In general it is necessary to show

¹⁶*Suffolk M. Co. v. Hayden*, 3 Wall. 320, 18 L. ed. 76; *Brickill v. Mayor*, 60 Fed. 102, 8 C. C. A. 500; *Cassidy v. Hunt*, 75 Fed. 1014 and cases cited. But compare *Coupe v. Royer*, 155 U. S. 565, 39 L. ed. 263, 15 Sup. Ct. Rep. 206, 207; *Boston v. Allen*, 91 Fed. 252, 33 C. C. A. 485.

¹⁷*Campbell v. Mayor*, 81 Fed. 187; *Ross v. Montana U. Ry.* 45 Fed. 431; *Lee v. Pillsbury*, 49 Fed. 747.

¹⁸*Yale L. Co. v. Sargent*, 117 U. S. 552, 29 L. ed. 954, 6 Sup. Ct. Rep. 934; *McComb v. Brodie*, 1 Woods. 153, Fed. Cas. No. 8,708; *Hunt Co. v. Cassidy*, 64 Fed. 585, 12 C. C. A. 316.

¹⁹See *Cassiday v. Hunt*, 75 Fed. 1013, reviewing the cases.

²⁰*Creamer v. Bowers*, 35 Fed. 209; *Covert v. Sargent*, 38 Fed. 237; *Rose v. Hirsh*, 94 Fed. 177, 36 C. C. A. 132, 1 L.R.A. 801; *Blake v. Greenwood*, 16 Fed. 676, 21 Blatchf. 222; *Zane v. Peck*, 13 Fed. 475.

¹*McCormick v. Seymour*, 3 Blatchf. 209, Fed. Cas. No. 8,727.

²*Greenleaf v. Yale, etc. Co.* 17 Blatchf. 253, Fed. Cas. No. 5,783. But not a rescinded contract. *Bus-*

sey v. Excelsior Co. 1 Fed. 640, 1 McCrary 161.

³*Ross v. Montana U. Ry.* 45 Fed. 431.

⁴*Hunt Co. v. Cassidy*, 64 Fed. 585, 587, 12 C. C. A. 316 and cases cited.

⁵*Coupe v. Royer*, 155 U. S. 565, 39 L. ed. 270, 15 Sup. Ct. Rep. 199; *Boston v. Allen*, 91 Fed. 248, 33 C. C. A. 485.

⁶*Lee v. Pillsbury*, 49 Fed. 747.

⁷*Topliff v. Topliff*, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825; *Stimpson v. Railroad*, 1 Wall, Jr. 164, Fed. Cas. No. 13,456; *National F. Co. v. Elsas*, 86 Fed. 917, 30 C. C. A. 487; *Guyon v. Serrell*, 1 Blatchf. 244, Fed. Cas. No. 5,881; *Carlock v. Tappan*, 5 Fed. Cas. 76.

⁸*Welling v. La Bau*, 35 Fed. 302, and cases cited.

⁹See *Lyon v. Donaldson*, 34 Fed. 789; *National, etc. Co. v. Elsas*, 86 Fed. 917, 30 C. C. A. 487 (deliberate infringers); *Bell v. McCullough*, 1 Bond, 194, Fed. Cas. No. 1,256 (refusing, after expiration of patent); *Brodie v. Ophir M. Co.* 5 Sawy. 608, Fed. Cas. No. 1,919; *Seymour v. Mc-*

that the infringement was deliberate, wanton and persistent.¹⁰ But mere persistence if the case was a doubtful one has been held not ground for treble damages; nor very active competition in making sales.¹¹ Increase of damages has been refused where infringement was inadvertent;¹² or plaintiff was an assignee buying for speculation.¹³

§ 1172. Pleading and proof in actions for infringement.

In any action for infringement the defendant may plead the general issue,^{[b]-[c]} and having given notice in writing^[d] to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: First. That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, Third. That it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor; or, Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or, Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention,^[e] knowledge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon

Cormick, 16 How. 488, 14 L. ed. 1028; Guyon v. Serrell, 1 Blatchf. 244, Fed. Cas. No. 5,881; Russell v. Place, 5 Fish. 136, Fed. Cas. No. 12,161 (allowing increase); Schwarzel v. Holensshade, 3 Fish. 116, Fed. Cas. No. 12,506.

¹⁰Welling v. La Bau, 35 Fed. 302.

¹¹Morss v. Union F. Co. 39 Fed. 468.

¹²Emerson v. Simm, 6 Fish. 281, Fed. Cas. No. 4,443.

¹³Schwerzel v. Holensshade, 3 Fish. 161, Fed. Cas. No. 12,506.

like notice in the answer of the defendant, and with the like effect.^[c]

R. S. § 4920, as amended by act Mar. 3, 1897, c. 391, § 2, 29 Stat. 692,
U. S. Comp. Stat. 1901, p. 3394.

[a] In general.

The patent laws have contained a provision respecting the above matter, even since the act of 1793.¹⁷ In the act of 1836¹⁸ the provision took substantially its present form. The act of 1836 was superseded by the law of 1870¹⁹ and from there the above provision was carried forward into the Revised Statutes. The provision that "The like defenses may be pleaded in any suit in equity for relief against an alleged infringement," etc., was first added in the act of 1870.²⁰ That act also enlarged the provision as to the notice to be given by requiring it to specify the names of patentees and dates of patents and when granted. The amendment of 1897 consisted in adding to the third clause "or more than two years prior to his application for a patent therefor."²¹ This section does not apply to actions for royalties, but only for infringement.²

[b] The general issue and proofs and defenses thereunder without notice.

Under the general issue, and without the giving of the statutory notice, proof may be offered as to the state of the art.⁵ Evidence may be given that defendant made the alleged infringing sales as mere agent for plaintiff.⁶ But special methods may not be given in proof which are not properly admissible, by the ordinary rules as to evidence on the general issue.⁷ Want of novelty is put in issue by the plea of not guilty.⁸ In the absence of any defense raising the issue of want of novelty or nonpatentability it is nevertheless an available defense and the court may give judgment against plaintiff upon that ground on demurrer,⁹ or after answer;¹⁰ though evidence of want of novelty could not be given unless upon the

¹⁷See act Feb. 21, 1793, § 6; Act Apr. 10, 1800, § 6; Root v. Railroad, 105 U. S. 189, 26 L. ed. 981.

¹⁸Act July 4, 1836, § 15; 5 Stat. 117.

¹⁹Act July 8, 1870, § 61.

²⁰See Root v. Railroad, 105 U. S. 189, 26 L. ed. 981.

²¹Previously this was unnecessary. Parks v. Booth, 102 U. S. 96, 26 L. ed 57; See Kelleher v. Darling, 3 B. & A. 438, Fed. Cas. No. 7,653.

²Godell v. Wells, etc. Co. 70 Fed. 319.

⁵Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Dunbar v. Myers, 94 U. S. 198, 24 L. ed. 34; Missouri L. Co. v. Stimpel, 75 Fed. 583; Overweight, etc. Co. v. Imp. Order, etc. 94 Fed. 155, 36 C. C. A. 125.

⁶Morse v. Davis, 5 Blatchf. 40, Fed. Cas. No. 9,855.

⁷Kneass v. Schuykill Bank, 4 Wash. C. C. 9, Fed. Cas. No. 7,875.

⁸Blanchard v. Putnam, 8 Wall. 428, 19 L. ed. 433.

⁹Richards v. Chase E. Co. 158 U. S. 301, 39 L. ed. 992, 15 Sup. Ct. Rep. 831.

¹⁰Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Dunbar v. Myers, 94 U. S. 187, 24 L. ed. 34; Slawson v. Grand St. Ry. 107 U. S. 649, 27 L. ed. 576, 2 Sup. Ct. Rep. 663; Hendy v. Golden S. I. Wks. 127 U. S. 375, 32 L. ed. 207, 8 Sup. Ct. Rep. 1275; May v. Juneau Co. 137 U. S. 411, 34 L. ed. 729, 11 Sup. Ct. Rep. 102; Baldwin v. Kresl, 76 Fed. 823, 22 C. C. A. 593.

statutory notice.¹¹ So ambiguity or other defect in the specifications of plaintiff's patent may be availed of though not pleaded.¹²

[c] Defenses may still be specially pleaded.

It is permissible, notwithstanding this section, to plead specially any of the special defenses above enumerated and in the usual manner;¹⁴ but plaintiff is then entitled to thirty days before hearing thereon, as in the case of proceeding in accordance with the statute.¹⁵ So other defenses than those specified may be pleaded specially and, if not admissible under the general issue, must be so pleaded.¹⁶ Both the general issue and a special plea may be interposed;¹⁷ but not a special plea setting up the same defense of which notice is given under the general issue.¹⁸

[d] Notice.

The notice is not a pleading and need not be replied to.¹ It is required to be served on the adverse party,² but not to be filed in the clerk's office. It seems proper practice to file it in the clerk's office,³ or to produce and prove it at the trial so as to get it in the record.⁴ Its purpose is to guard patentees against surprise from unexpected evidence.⁵ If defective, a second notice may be served if thirty days before the trial, and leave of court is unnecessary.⁶ Notice thirty days before trial is in time though during the term.⁷ Compliance with the statute as to the giving of notice is prerequisite to the admissibility in evidence of the special matters therein stated.⁸ Novelty of a patentable invention can only be assailed by evidence

¹¹O'Reilly v. Morse, 15 How. 110, 14 L. ed. 601; La Baw v. Hawkins, 1 B. & A. 428, Fed. Cas. No. 7,960; Crouch v. Speer, 1 B. & A. 145, Fed. Cas. No. 3,438; Philadelphia R. R. Co. v. Dubois, 12 Wall. 47, 65, 20 L. ed. 265.

¹²Kneass v. Schuylkill Bank, 4 Wash. 9, Fed. Cas. No. 7,875.

¹⁴Evans v. Eaton, 3 Wheat. 504, 4 L. ed. 433; Grant v. Raymond, 6 Pet. 247, 8 L. ed. 376; Day v. New E. Co. 3 Blatchf. 181, Fed. Cas. No. 3,687. The section gives defendant an option. Cottier v. Stimson, 18 Fed. 689.

¹⁵Phillips v. Comstock, 4 McLean, 525, Fed. Cas. No. 11,099.

¹⁶Wilder v. Galyer, 1 Blatchf. 597, Fed. Cas. No. 17,649; Hubbell v. Deland, 14 Fed. 473, 474, 11 Biss. 382; Cottier v. Stimson, 18 Fed. 691; Brickell v. Hartford, 57 Fed. 217. See Sessions v. Romadka, 145 U. S. 299, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; Winchester Co. v. American B. Co. 54 Fed. 703; New D. etc. Co. v. Revin, 64 Fed. 860, as to defense of failure to mark patented article.

¹⁷Cottier v. Stimson, 18 Fed. 691; Brickell v. Hartford, 57 Fed. 217.

¹⁸Read v. Miller, 2 Biss. 16, Fed. Cas. No. 11,610.

¹Cottier v. Stimson, 20 Fed. 906. ²Ibid.

³It may be filed. See Teese v. Huntington, 23 How. 2, 16 L. ed. 479.

⁴See Blanchard v. Putnam, 8 Wall. 428, 19 L. ed. 436, 437, per Swayne, J.

⁵Teese v. Huntington, 23 How. 10, 16 L. ed. 479; Agawam v. Jordan, 7 Wall. 596, 19 L. ed. 180.

⁶Teese v. Huntington, 23 How. 2, 10 L. ed. 479.

⁷Brunswick v. Holzalb, 4 Fed. Cas. p. 497. But see Westlake v. Cartter, 6 Fish. 519, Fed. Cas. 17,451.

⁸Blanchard v. Putnam, 8 Wall. 427, 428, 19 L. ed. 433; Roemer v. Simon, 95 U. S. 215, 219, 24 L. ed. 384; Searls v. Bouton, 12 Fed. 142, 20 Blatchf. 426; Westlake v. Cartter, 6 Fish. 519, Fed. Cas. No. 17,451; Silsby v. Foote, 14 How. 223, 14 L. ed. 398.

of which notice has been given.⁹ But if plaintiff fails to make due objection there is no error in admitting evidence without or upon defective notice.¹⁰

[e] Notices as to previous invention knowledge or use—names.

Names of witnesses as distinguished from names of inventors, users, etc., need not be given;¹¹ nor need the prior use, names, etc., be as specifically stated where alleged to be by patentee himself and those acting under him;¹² nor where alleged to be by respondents themselves.¹³ But there must be a reasonable particularity in the notice;¹⁴ so that plaintiff can readily identify and resort to the proposed evidence,¹⁵ and be prepared to meet it at the trial.¹⁶ Much must depend upon the nature and circumstances of a particular case as to the sufficiency of notice of prior use, etc. Notice of use in a named county is too general;¹⁷ and notice designating one or more cities may¹⁸ or may not¹⁹ be sufficient. Designation of a town, and the witnesses by whom prior use is to be proved will suffice.²⁰ A specification of certain mining camps within a county has been held sufficient.¹

[f] Defenses in equity.

Although statutory authority for the practice of requiring the answer in equity to state the enumerated defenses as specifically as the notice at law, was first provided by the act of 1870,² "it was rather a recognition of what had already been established than its introduction; for the practice had, in fact, originated long before and was based upon well known principles of equity jurisprudence."³ Special or separate notice is not given in equity,⁴

⁹*Railroad Co. v. Dubois*, 12 Wall. 65, 20 L. ed. 265; *La Baw v. Hawkins*, 1 B. & A. 428, Fed. Cas. No. 7,960.

¹⁰*Roemer v. Simon*, 95 U. S. 219, 220, 24 L. ed. 384; *Plaining M. Co. v. Keith*, 101 U. S. 492, 25 L. ed. 944; *Loom Co. v. Higgins*, 105 U. S. 592, 26 L. ed. 1183; *Smith, etc. Co. v. Mellon*, 58 Fed. 706, 7 C. C. A. 439.

¹¹*Plaining M. Co. v. Keith*, 101 U. S. 493, 25 L. ed. 944; *Woodbury P. Co. v. Keith*, 30 Fed. Cas. p. 490; *Allis v. Buckstaff*, 13 Fed. 884.

¹²*American H. etc. Co. v. American T. etc. Co.* 1 Holmes, 505, Fed. Cas. No. 302.

¹³*Anderson v. Miller*, 129 U. S. 70, 32 L. ed. 635, 9 Sup. Ct. Rep. 224.

¹⁴*Silshy v. Foote*, 14 How. 222, 223, 14 L. ed. 394, nolding page of dictionary describing invention should be specified and place of use. Lock

v. Pennsylvania R. R. 1 N. J. L. J. 227, Fed. Cas. No. 8,438, designation of town of residence sufficient where small.

¹⁵*Smith v. Frazer*, 5 Fish. 543, Fed. Cas. No. 13,048.

¹⁶*Anderson v. Miller*, 129 U. S. 70, 32 L. ed. 635, 9 Sup. Ct. Rep. 224.

¹⁷*Hays v. Sulsor*, 1 Bond, 279, Fed. Cas. No. 6,271.

¹⁸*Phillips v. Page*, 24 How. 168, 16 L. ed. 641.

¹⁹*Latta v. Shawk*, 1 Bond, 259, Fed. Cas. N. 8116.

²⁰*Wise v. Allis*, 9 Wall. 739, 740, 19 L. ed. 784.

¹*Smith v. Frazer*, 5 Fish. 545, Fed. Cas. No. 13,048.

²*Supra*, note [a].

³*Root v. Railroad*, 105 U. S. 191, 26 L. ed. 981.

⁴*Doughty v. West*, 2 Fish. 553, Fed. Cas. No. 4029.

but it is embodied in the answer and exceptions should be taken to the answer in case of insufficiency in the notice.⁵

§ 1173. Jury may be empaneled in equity to try issues of fact.

Said courts [i. e., the circuit courts of the United States] when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.

§ 2 of act Feb. 16, 1875, c. 77, 18 Stat. 316, U. S. Comp. Stat. 1901, p. 526.

The trial of issues of fact arising in an equity suit by a jury upon the law side of the circuit court, and the circumstances when it will be ordered, and the merely advisory character of the verdict, have already been considered.⁶ The Supreme Court has never made any rule prescribing the procedure under this section. It will be observed that it contemplates the empaneling of a jury in the court sitting as a court of equity and not a reference to the law side.

§ 1174. Suit for infringement where specification of patent too broad.

Whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in

⁵Graham v. Mason, 4 Cliff. 88 Fed. 2 Sup. Ct. Rep. 225; Parks v. Booth, Cas. No. 5,671. See Atlantic Wks. v. 102 U. S. 96, 26 L. ed. 54. Brady, 107 U. S. 192, 27 L. ed. 438, ⁶Ante, § 1067 [b].

every case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

R. S. § 4922, U. S. Comp. Stat. 1901, p. 3396.

This provision was originally enacted in 1870.⁸ An act of 1837 contained a similar section.⁹ Disclaimer may be filed after commencement of suit as well as before;¹⁰ but the right to costs is lost by delay until after suit.¹¹ The power of disclaimer is beneficial and ought not to be denied except where it is resorted to for a fraudulent or deceptive purpose.¹² A reissued patent is within the meaning of this section.¹³ If filed after suit brought, the court should see that defendant is not injuriously surprised and may impose such terms as justice requires.¹⁴ But where the suit does not involve any of the claims of the patent which were too broad and should have been disclaimed, plaintiff's right to costs is not lost by failure to disclaim until after suit brought or failure to disclaim at all;¹⁵ nor, it seems, is it lost where he merely abandons enlarged claims of a reissue without filing disclaimer.¹⁶ After hearing and decision on the merits in equity disclaimer cannot be filed,¹⁷ except upon petition for rehearing; though the court may then permit a disclaimer in support of previous disclaimer filed by the nominal plaintiff.¹⁸

It is an unreasonable delay to wait until the expiration of patent before filing disclaimer.¹ Inference of unreasonable delay is repelled by the fact of the granting of patent and decision by a lower court sustaining it.² Plaintiff need not disclaim, in such a case, until decision by the Supreme Court.³

⁸Act July 8, 1870, c. 230, § 60, 16 Stat. 207.

⁹Act Mar. 3, 1837, § 9, 5 Stat. 193.

¹⁰Smith v. Nichols, 21 Wall. 117, 22 L. ed. 566.

¹¹Sessions v. Romadka, 145 U. S. 40, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; Myers v. Frame, 8 Blatchf. 446, Fed. Cas. No. 9,991.

¹²Sessions v. Romadka, 145 U. S. 40, 36 L. ed. 609, 12 Sup. Ct. Rep. 799.

¹³Gage v. Herring, 107 U. S. 640, 27 L. ed. 604, 2 Sup. Ct. Rep. 819.

¹⁴Smith v. Nichols, 21 Wall. 117, 22 L. ed. 566.

¹⁵Elastic F. Co. v. Smith, 100 U. S. 110, 25 L. ed. 547; Gamewell Co. v. Municipal Co. 77 Fed. 490, 23 C.

A. 250; American B. T. Co. v. Spencer, 8 Fed. 509.

¹⁶Mundy v. Lidgerwood M. Co. 20 Fed. 191.

¹⁷See Roemer v. Bernheim, 132 U. S. 106, 33 L. ed. 277, 10 Sup. Ct. Rep. 12, imposing costs as condition of permitting it.

¹⁸Myers v. Frame, 8 Blatchf. 446, Fed. Cas. No. 9,991.

¹Vacuum Oil Co. v. Buffalo, etc. Co. 23 Fed. 891.

²Seymour v. McCormick, 19 How. 106, 15 L. ed. 557.

³O'Reilly v. Morse, 15 How. 62, 120, 121, 14 L. ed. 601; Seymour v. McCormick, 19 How. 106, 15 L. ed. 557; Gage v. Herring, 107 U. S. 646, 647, 27 L. ed. 604, 2 Sup. Ct. Rep. 819.

§ 1175. Recovery by owner of design patent for infringement thereof.

Any person violating the provisions, or either of them, of this section [forbidding unauthorized use of a patented design] shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement.

Part of § 1, act Feb. 4, 1887, c. 105, 24 Stat. 387, U. S. Comp. Stat. 1901, p. 3398.

The liability imposed by the above section has been held in the nature of a statutory penalty, and not a profit liquidated; and hence not recoverable from an infringer ignorant of the patent and in the absence of patent mark.⁶ But one penalty is recoverable under this section for one sale, though there were three design patents infringed.⁷ It will be observed that this statute makes the profits on the article or articles to which the design is applied, recoverable,⁸ and not merely such profits are attributable to the design.⁹

§ 1176. — remedy by existing law not impaired, but owner not to recover twice.

Nothing in this act contained [forbidding the unauthorized use of a patented design]¹¹ shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement.

§ 2 of act Feb. 4, 1887, c. 105, 24 Stat. 387, U. S. Comp. Stat. 1901, p. 3398.

⁶Monroe v. Anderson, 58 Fed. 398. 205, 7 C. C. A. 183. Formerly the 7 C. C. A. 272. See Schofield v. Dunlop, 42 Fed. 323; Pirkel v. Smith, 42 Fed. 410. ⁹Dobson v. Hartford C. Co. 114 U. S. 444, 29 L. ed. 177, 5 Sup. Ct. Rep. 945.
⁷Gimbel v. Hogg, 97 Fed. 791, 38 C. C. A. 419.
⁸Untermyer v. Freund, 58 Fed.

¹¹See also ante, § 1175.

§ 1177. Federal cognizance of trademark infringement cases, how restricted.

Nothing in this act shall be construed as unfavorably affecting a claim to a trademark after the term of registration shall have expired; nor to give cognizance to any court of the United States in an action or suit between citizens of the same State, unless the trademark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe.

§ 11 of act March 3, 1881, c. 138, 21 Stat. 504, U. S. Comp. Stat. 1901, p. 3404.

[a] — The Federal jurisdiction and Federal trademark legislation.

Previous to the above act of 1881, Congress had embodied a series of provisions respecting the legislation of trademarks and their protection when registered, in the patent act of 1870.¹² Those provisions constituted the first Federal legislation upon the subject and were carried forward into the Revised Statutes, §§ 4937-4947. The Supreme Court declared this legislation, and a supplementary act of 1876 prescribing penalties, etc.,¹³ to be beyond powers delegated to Congress and hence void.¹⁴ The act of 1881 followed. The objection to the earlier act is sought to be obviated by confining the provisions of the law of 1881 to commerce over which Congress has been given power to legislate; but the Supreme Court has not as yet passed upon its validity.¹⁵ The right of property in a trademark is a common-law right. It is not of Federal origin, nor dependent upon the validity of the Federal law nor upon registration thereunder.¹⁶ State courts have jurisdiction in such cases;¹⁷ and the Federal courts may adjudicate trademark cases where diverse citizenship exists, just as in the case of other rights of a non-Federal character.¹⁸ If diverse citizenship exists it is not necessary to show registration and use conforming to the Federal statute.¹⁹ If that ground of jurisdiction does not exist the jurisdiction must be supported under the act of 1881 by a showing of valid registration,²⁰ and use

¹²See act July 8, 1870, §§ 77-84, 16 Stat. 198.

¹³Act Aug. 14, 1876, 19 Stat. 141.

¹⁴Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550.

¹⁵See *Elgin N. W. Co. v. Illinois W. C. Co.* 179 U. S. 677, 45 L. ed. 382, 21 Sup. Ct. Rep. 270, holding that as valid registration of "Elgin" as trademark could not be made under the act, the court was not required to determine the act's validity.

¹⁶Trademark Cases, 100 U. S. 82, 25 L. ed. 550; *Harris Co. v. Stucky*,

46 Fed. 627; *Hennessy v. Braunschweiler*, 89 Fed. 667.

¹⁷*Smail v. Sanders*, 118 Ind. 105, 20 N. E. 297; *Handy v. Commander*, 49 La. Ann. 1128, 22 South, 235; *Gessler v. Grieb*, 80 Wis. 27, 27 Am. St. Rep. 24, 48 N. W. 1100.

¹⁸*LaCroix v. May*, 15 Fed. 237; *Hennessy v. Hermann*, 89 Fed. 668;

¹⁹*Hennessy v. Braunschweiler*, 89 Fed. 668.

²⁰*Elgin Wks. v. Illinois W. Co.* 179 U. S. 665, 45 L. ed. 380, 21 Sup. Ct. Rep. 270.

in foreign commerce, or commerce with an Indian tribe.¹ It results that the law of 1881 serves, if valid, to give jurisdiction to the Federal courts in certain cases of which they would not otherwise have jurisdiction, and for certain infringements; and is of some service in creating a permanent record of trademarks, but is otherwise of but little value.⁵

§ 1178. Remedies for infringement of trademarks.

Registration of a trademark shall be prima facie evidence of ownership. Any person who shall reproduce, counterfeit, copy or colorably imitate any trademark registered under this act and affix the same to merchandise of substantially the same descriptive property as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trademark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trademark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy.

§ 7 of act March 3, 1881, c. 138, 21 Stat. 503, U. S. Comp. Stat. 1901, p. 3403.

The course of Federal trademark legislation and the Federal jurisdiction thereunder are considered in a note to the preceding section.⁹ The remedies by action on the case and by equity suit for injunction are analogous to the remedies furnished in patent infringement cases.¹⁰

§ 1179. — when action not maintainable.

No action or suit shall be maintained under the provisions of this act in any case when the trademark is used in any unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or under any certificate of registry fraudulently obtained.

§ 8 of act Mar. 3, 1881, c. 138, 21 Stat. 504, U. S. Comp. Stat. 1901, p. 3403.

¹*Luyties v. Hollender*, 21 Fed. 281; *Hennessy v. Braunschweiger*, 89 Fed. *Sarrazin v. Irby Co.* 93 Fed. 627, 35 668.
C. C. A. 499, 46 L.R.A. 541; *Schumacher v. Schwencke*, 26 Fed. 818; *Prince M. Co. v. Prince M. Co.* 53 Fed. 493; ⁵*Hennessy v. Braunschweiger*, 89 Fed. 668.

⁹Ante. § 1177.

¹⁰Ante. § 1170 [b].

§ 1180. Remedy of one injured by fraudulent registration of trademark.

Any person who shall procure the registry of a trademark, or of himself as the owner of a trademark or an entry respecting a trademark, in the office of the Commissioner of Patents, by a false or fraudulent representation or declaration, orally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence thereof to the injured party, to be recovered in an action on the case.

§ 9 of act March 3, 1881, c. 138, 21 Stat. 504, U. S. Comp. Stat. 1901, p. 3404.

§ 1181. — existing remedies unimpaired by trademark act.

Nothing in this act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this act had not been passed.

§ 10 of act March 3, 1881, c. 138, 21 Stat. 504, U. S. Comp. Stat. 1901, p. 3404.

As is elsewhere explained,¹⁴ right to a trademark is of a common law character and in nowise dependent upon compliance with the terms of the Federal statute. The State courts have as complete jurisdiction to grant relief as have the Federal courts. The above provision saving existing remedies prevents a construction of this act which would restrict the Federal jurisdiction in trademark cases to such as have been registered.

§ 1182. Injunction in copyright cases.

The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.^{[a]-[c]}

R. S. § 4970, U. S. Comp. Stat. 1901, p. 3416.

[a] In general.

This provision is taken from an act of 1870.¹⁷ That act superseded the copyright law of 1831.¹⁸ There are no longer any district courts with

¹⁴Ante, § 1177 [a]-[b].

¹⁸Act Feb. 3, 1831, c. 16, 4 Stat.

¹⁷Act July 8, 1870, c. 230, § 106, 436. See *Little v. Hall*, 18 How. 170, 16 Stat. 215.

15 L. ed. 328.

circuit court powers, as there is now a circuit court in every district.¹⁹ There are various provisions as to damages and penalties for violation of copyright which are not included herein because beyond the scope of this work.

[b] The remedy in equity.

Action at law in the nature of action on the case, lies for violation of copyright;¹ and replevin to compel a forfeiture.² But where there are the circumstances of continuous or threatened injury such as warrant courts of equity in issuing injunction, a party may proceed by suit in equity and in that suit recover also the damages and profits to which he is entitled.³ He need not first establish his right, or the infringement, at law.⁴ But he may not recover statutory penalties in the equity suit unless the law expressly provides therefor;⁵ and if the right to injunction does not exist, equity will not award accounting or damages.⁶ If the proceeding is in equity there is no material difference between the rules applicable to a copyright suit and those applicable to other equity suits.⁷ The bill must allege performance of the statutory acts necessary to perfect the copyright;⁸ and show copyright in complainant.⁹ Long acquiescence will be a bar.¹⁰ Equity will settle a disputed title to a copyright in the injunction proceedings;¹¹ and an assignee may sue without first establishing his title at law.¹² So, discovery may be had in the equity suit where complainant waives any forfeitures or penalties to which defendant might be subjected by answering the interrogatories.¹³

¹⁹Ante. § 103.

¹Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Reed v. Carusi, Taney, 72, Fed. Cas. No. 11,642; Blunt v. Patten, 2 Paine, 397, Fed. Cas. No. 1,580.

²Morrison v. Pettibone, 87 Fed. 331.

³Stevens v. Gladding, 17 How. 455, 15 L. ed. 155; Fishel v. Luskkel, 53 Fed. 501; Falk v. Lithograph Co. 54 Fed. 894, 4 C. C. A. 648. See Stevens v. Cady, 2 Curt. 200, Fed. Cas. No. 13,395; Callaghan v. Myers, 128 U. S. 665, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Belford v. Scribner, 144 U. S. 508, 36 L. ed. 514, 12 Sup. Ct. Rep. 734.

⁴Farmer v. Calvert L. Co. 1 Flip. 228, Fed. Cas. No. 4,651.

⁵Stevens v. Gladding, 17 How. 455, 15 L. ed. 155; Callaghan v. Myers, 128 U. S. 663, 32 L. ed. 561, 9 Sup. Ct. Rep. 190; Chapman v. Ferry, 12 Fed. 695, 8 Sawy. 191; Gilmore v. Anderson, 38 Fed. 848; Trow City

etc. Co. v. Curtin, 36 Fed. 830; Morrison v. Pettibone, 87 Fed. 331.

⁶Draper v. Hudson, 1 Holmes, 209, Fed. Cas. No. 4,069.

⁷Scribner v. Stoddart, 19 Amer. Law. Reg. (N. S.) 430, Fed. Cas. No. 12,561.

⁸Parkinson v. Laselle, 3 Sawy. 330, Fed. Cas. No. 10,762; Boucicault v. Hart, 13 Blatchf. 47, Fed. Cas. No. 1692.

⁹Chase v. Sanborn, 4 Cliff. 306, Fed. Cas. No. 2,628; Greene v. Bishop, 1 Cliff. 186, Fed. Cas. No. 5,763.

¹⁰Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136.

¹¹Binns v. Woodruff, 4 Wash. C. C. 48, Fed. Cas. No. 1,424.

¹²Gould v. Hastings, 5 Hunt, Mer. Mag. 74, Fed. Cas. No. 5,639. See Webb v. Powers, 2 Woodb. & M. 497, Fed. Cas. No. 17,323; Farmer v. Calvert L. Co. 1 Flip. 228, Fed. Cas. No. 4,651.

¹³Atwell v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640. See Chapman v. Ferry, 12 Fed. 693, 8 Sawy. 191.

[c] Temporary and permanent injunction.

Temporary injunction is largely discretionary,¹⁶ to be awarded where infringement is palpable and of no serious consequences will result to defendant;¹⁷ or denied if the infringements are minor or incidental and great injury might result to defendant;¹⁸ or the copyright is not clear;¹⁹ or the infringement is not satisfactorily shown.²⁰ So, permanent injunction may be refused where the amount copied is small and of little value, and there was no bad motive.¹ The injunction will be limited to the part that infringes,² if it can be separated.³

§ 1183. Injunction against sale, etc. of articles with false copyright notice.

The circuit courts of the United States sitting in equity are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the United States copyright laws, at the suit of any person complaining of such violation: Provided, That this act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof.

Part of R. S. § 4963 as amended Mar. 3, 1897, c. 392, § 1, 29 Stat. 694, U. S. Comp. Stat. 1901, p. 3413.

Originally this section merely provided a penalty for false notice of copy right against the person inserting or impressing the false notice. The amendment of 1897 broadened the prohibition and applied the penalty also to importation of books, etc., bearing such false notice, declared the penalty to be recovered one half by the informer and one half by the United States; and gave the further remedy by injunction.

§ 1184. — against infringement of dramatic or unissued composition—procedure.

Any injunction that may be granted upon hearing after notice to the defendant by any circuit court of the United States, or by a judge thereof, restraining and enjoining the performance or representation [by an unauthorized person] of any such dramatic or

¹⁶See ante, § 1114.

¹⁷See *Banks v. McDivitt*, 13 Blatchf. 170, Fed. Cas. No. 961.

¹⁸*Ladd v. Oxnard*, 75 Fed. 703; *Hansen v. Jaccard I. Co.* 32 Fed. 202; *Scribner v. Stoddart*, 19 Amer. Law Reg. (N. S.) 433, Fed. Cas. No. 12,561. See *Leech v. Freleigh*, 1 Cranch, C. C. 477, Fed. Cas. No. 8,204a.

¹⁹*Miller v. McElroy*, 2 Pa. Law J. 305, Fed. Cas. No. 9,581.

²⁰*Blunt v. Patten*, 2 Paine, 397, Fed. Cas. No. 1,580; *Flint v. Jones*, 3 Law Rep. 175, Fed. Cas. No. 4,872.

¹*Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136.

²*List Pub. Co. v. Keller*, 30 Fed. 772.

³*Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136; *Webb v. Powers*, 2 Woodb. & M. 497, Fed. Cas. No. 17,323.

musical composition [as has been copyrighted] may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other circuit court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the circuit court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The circuit courts or judges thereof shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made. The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.

Part of R. S. § 4966, as amended Jan. 6, 1897, c. 4, 29 Stat. 481, U. S. Comp. Stat. 1901, p. 3415.

All of the above portion of R. S. § 4966 was added by the amendatory act of 1897. Originally the section merely provided a liability in damages not less than \$100 for the first performance and \$50 for every subsequent performance. This provision provides for the enforcement or modification of the injunction in any district;⁶ without the necessity for going before the court issuing the writ.⁷ It seems to permit suit to be brought in any district where defendant is found though not a resident there.⁸

§ 1185. Effect of plea of general issue in copyright infringement cases.

In all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence.

R. S. § 4969, U. S. Comp. Stat. 1901, p. 3416.

This provision was originally enacted in 1870.⁹ This provision is

⁶Fraser v. Barrie, 105 Fed. 787.

⁷Lederer v. Rankin, 90 Fed. 449.

⁸Lederer v. Rankin, 90 Fed. 449.

But see contra. Fraser v. Barrie, 105 Fed. 787.

⁹Act July 8, 1870, c. 230, § 105, 16 Stat. 215.

to be read in conjunction with R. S. § 914, requiring Federal proceedings at law to conform "as near as may be" to the State practice.¹⁰ Hence, the plea of the general issue above provided should be in the form obtaining in the local practice and not the ancient common law form.¹¹ So the form of the action at law must be that which is in use in the State practice. Usually where the action is for damages, it will be in the form of action on the case;¹² although it is to be observed that the statute does not, as in patent infringement cases,¹³ declare that that shall be the form. It has been held that action in the form of trover or replevin is proper to enforce forfeitures under the patent laws.¹⁴

¹⁰Ante, § 900.

Blunt v. Patten, 2 Paine, 397, Fed.

¹¹Johnston v. Klopsch, 88 Fed. 692. Cas. No. 1,580.

Compare ante, § 1171 [b].

¹³See ante, § 1171.

¹²See Atwill v. Ferrett, 2 Blatchf. ¹⁴Stevens v. Cady, 2 Curt. 200, 39, Fed. Cas. No. 640; Reed v. Cady, Fed. Cas. No. 13,395; Morrison v. rusi, Taney, 72, Fed. Cas. No. 11,642; Pettibone, 87 Fed. 331.

CHAPTER 35.

ADMIRALTY PROCEDURE IN GENERAL—THE LIBEL AND PROCESS.

- § 1195. Forms and proceedings in admiralty—how prescribed.
- § 1196. Supreme Court to prescribe practice and procedure.
- § 1197. Power of circuit and district courts to prescribe procedure.
- § 1198. The libel.
- § 1199. Libel and information for seizure.
- § 1200. Exceptions to libel and allowance thereof.
- § 1201. Amendment of libels and informations.
- § 1202. When process issued and by whom served.
- § 1203. Process of arrest, attachment and monition in suits in personam.
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- § 1205. Bail in cases of arrest, stipulation and execution thereon.
- § 1206. —to be taken whenever required by laws of State.
- § 1207. —result where imprisonment for debt abolished.
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- § 1210. Process by arrest of ship, etc. in suits in rem.
- § 1211. —now possession of ship's tackle, etc., to be obtained from third persons.
- § 1212. —how freight money and other property brought into court in suits in rem.
- § 1213. Form of process in petition and possessory suits.

§ 1195. Forms and proceedings in admiralty—how prescribed.

The forms of mesne process and the forms and modes of proceeding in suits . . . of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts . . . of admiralty, . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, . . . and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

R. S. § 913, U. S. Comp. Stat. 1901, p. 683.

The section also specifies equity causes.¹ As is elsewhere shown it was first enacted in 1789, and amended several times thereafter before its incorporation in the Revised Statutes.² An act of August 23, 1842, gave the Supreme Court power to regulate the admiralty practice by rules of court, in yet ampler form.³ Admiralty courts proceed according to principles of admiralty as distinguished from common law.⁴ It was early decided that while the principles of admiralty adopted by this section were English in their origin, yet if a variation had grown up in the American practice this section intended that such practice should be followed.⁵ In other words it was the existing admiralty practice of the American courts that was adopted.⁶ Great flexibility is a distinguishing feature of the admiralty practice and it enables the courts in most cases, so to shape their proceedings as to obtain justice between the parties.⁷

§ 1196. Supreme Court to prescribe practice and procedure.

The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering, and enrolling decrees, and of proceedings before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in . . . admiralty, by the circuit and district courts.

R. S. § 917, U. S. Comp. Stat. 1901, p. 684.

The above section was originally enacted in 1842⁸ and carried forward into the Revised Statutes. It covers equity as well as admiralty procedure.⁹ The Supreme Court promulgated the admiralty rules which constitute a virtual code of admiralty practice, pursuant to the power conferred by the above provision. Originally there were forty-six rules. In all thirteen additional rules have since been added making a total of fifty-nine. They have the operative effect and binding force of law.¹⁰

¹Ante, § 936.

²See ante, § 936.

³Post, § 1196.

⁴United States v. Ames, 99 U. S. 36, 25 L. ed. 295. The law administered in admiralty, see ante, § 11.

⁵Manro v. Almeida, 10 Wheat. 490, 6 L. ed. 369; Steam Stonecutter Co. v. Sears, 9 Fed. 10, 20 Blatchf. 23; Gardner v. Isaacson, 1 Abb. 148, Fed. Cas. No. 5,230.

⁶Ward v. Chamberlain, 2 Black, 440, 17 L. ed. 325; Atkins v. Disin-

tegrating Co., 18 Wall. 304, 21 L. ed. 845; Van Hook v. Pendleton, 2 Blatchf. 86, Fed. Cas. No. 16,852; The Delaware, 1 Ole. 240, Fed. Cas. No. 3,762.

⁷The Benefactor, 103 U. S. 244, 26 L. ed. 351; Oregon, etc. Co. v. Bal-four, 90 Fed. 299, 33 C. C. A. 57.

⁸Act Aug. 23, 1842, c. 188, § 6. 5 Stat. 518.

⁹See ante, § 802.

¹⁰The Sabine, 101 U. S. 388, 25 L. ed. 982.

§ 1197. Power of circuit and district courts to prescribe procedure.

In all cases not provided for by the foregoing rules [i. e., the admiralty rules of the Supreme Court], the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

46th admiralty rule promulgated 1844.

District Court rules have been promulgated pursuant to the power thus conferred, in probably all of the districts where there is any considerable admiralty practice. The rules in the Southern district of New York are especially worthy of note in view of the large volume of admiralty business in that district. The practitioner should advise himself as to local rules in any particular district. District court rules at variance with any of the admiralty rules of the Supreme Court are necessarily nugatory.¹³ But the district courts may safely prescribe a practice which really carries out the spirit of the admiralty rules. Thus, rule 46 has been relied on in one case which applied by analogy, the specific provision of rule 6¹⁴ regarding new sureties in personam, to a suit in rem.¹⁵ In several cases the district courts have felt free under rule 46, to adopt the practice of permitting joinder of suits in rem and in personam on charter parties and contracts of affreightment.¹⁶

§ 1198. The libel.

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be in rem, that the property is within the district; and if in personam, the names and occupations and places of residence of the parties.^[a] The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article;^[b] and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the

¹³See *The Edwin Baxter*, 32 Fed. Fed. Cas. No. 18,208; *Vaughan v. 630*
296. Casks, 7 Ben. 507, Fed. Cas. No. 16,-

¹⁴See post, § 1216. 900; *The Monte A.* 12 Fed. 336;

¹⁵See *The City of Hartford*. 11 The J. F. Warner, 22 Fed. 343; *The*
Fed. 39. Director, 26 Fed. 711.

¹⁶*The Zenobia*, 1 Abb. Adm. 48.

premises.^{[c]-[d]} And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.^[e]

23rd admiralty rule promulgated 1844.

[a] Libel in general.

The libel in admiralty corresponds with the bill in equity and the declaration or complaint at law. It is the first pleading of the party who invokes the jurisdiction of admiralty, such party being variously termed libellant, actor. It must be filed before process can issue and hence the filing of libel in the district court is the first step to be taken. Since Federal jurisdiction should affirmatively appear,¹⁷ it is always necessary to show facts making out a case within the admiralty jurisdiction;¹⁸ and the usual practice is to insert an averment that the cause is within "the admiralty and maritime jurisdiction of this honorable court." While the rule requires an averment that property libeled is within the district the claimant cannot prove the averment in fact false so long as the property came subsequently within the district and was then actually seized.¹⁹

[b] Form and contents.

The subject matter of the libel should be stated with certainty and precision, and with averments admitting of distinct answers.²⁰ Thus, movements and courses of vessels in case of collision should be stated;¹ time and place should appear;² and a detailed description of a contract sued on.³ But an omission to state some facts which prove material will not prejudice libellant if the omission was unintentional and in fact did not injure the opposite party.⁴ The interest of libellant in the subject matter of the suit should be stated.⁵ Where name of a party having no interest is inserted in the libel, it may be disregarded.⁷ It is not necessary in a libel to state any fact which constitutes a matter of defense.⁸ Libel for damages for abandonment of towage contract, should point out manner in

¹⁷Ante, § 9.

¹⁸Boon v. The Hornet, 1 Crabbe, 426. Fed. Cas. No. 1,640; Thomas v. Lane, 2 Sum. 1, Fed. Cas. No. 13,902.

¹⁹Queen of the Pacific, 61 Fed. 213. affirmed Pacific Coast S. S. Co. v. Bancroft-Whitney Co. 94 Fed. 180, 36 C. C. A. 135.

²⁰Schooner Boston, 1 Sum. 328, Fed. Cas. No. 1,673; The Bark Havre, 1 Ben. 285, Fed. Cas. No. 6,232; Pettingill v. Dinsmore, Davies, 209; Fed. Cas. No. 11,045; McWilliams v. The Vim, 2 Fed. 874.

¹McWilliams v. Steam Tug Vim. 382, 3 L. ed. 378.

²Fed. 874; see also Virginia, etc. Ins. Co. v. Sunberg, 54 Fed. 389.

³Treadwell v. Joseph, 1 Sum. 390, Fed. Cas. No. 14,157; Thomas v. Lane, 2 Sum. 1, Fed. Cas. No. 13,902.

⁴The Anchoria, 9 Fed. 840.

⁵The Quickstep, 9 Wall. 670, 19 L. ed. 767; The Syracuse, 12 Wall. 173, 20 L. ed. 382.

⁶See Minturn v. Alexandre, 5 Fed. 117.

⁷Talbot v. Wakeman, 19 How. Pr. 36, Fed. Cas. No. 13,731.

⁸Aurora v. United States, 7 Cranch.

which alleged damage arose.⁹ Libel need not allege matters of which the court can take judicial notice.¹⁰ Failure to aver that the respondent was the owner of vessel at the time of collision makes libel in personam defective.¹¹ Where parties joined as libellants are corporations, the libel should so aver¹² where the cause of action has arisen from the violation of a written contract of affreightment the libel should so state and the contract should be annexed to the libel, or a legal excuse for its absence given.¹³ So in an action on a charter party, a copy thereof should be filed with the libel.¹⁴ Where the libel contains other allegations stating a cause of action in rem, those relating to such claim may be disregarded as surplusage and the misjoinder will not be fatal.¹⁵ Libel in rem should state the nationality of the vessel proceeded against but such allegation is not indispensable when libellant alleges that he is a citizen of the United States.¹⁶ There are no technical admiralty rules as to variance, and amendments of the libel are liberally allowed.¹⁷ Liberal treatment is generally accorded to pleadings though this liberality will not be exercised to the prejudice for the other party.¹⁸ Alternative relief properly pleaded may be prayed.¹⁹

[c] Prayer.

There appear to be no technical rules as to the prayer in a libel in admiralty, but where libellant propounds distinctly the substantial facts, and prays generally or specially for relief, the court may award any relief, which the law applicable to the case warrants.²⁰

[d] Signing and verification

The proper practice apparently is for each libellant to sign and verify the libel. But the signature and verification by the proctor has been allowed in the case of certain libellants who were absent from the State. This practice, however, is not to be commended.²¹

[e] Interrogatories and discovery.

The importance of the interrogatories and their value to a libellant have largely disappeared, just as in the case of discovery in equity,²² since the passage of laws now universally in force, permitting parties to be called as witnesses. The 30th admiralty rule excuses the respondent from answer-

⁹The *Osconda*, 66 Fed. 347.

¹⁰*Lands v. A Cargo of Two Hundred and Twenty-seven Tons of Coal*, 4 Fed. 478.

¹¹*The Corsair*, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949.

¹²*Sun, etc. Ins. Co. v. Mississippi*, etc. *Transportation Co.* 14 Fed. 699, 4 *McCrary*, 636.

¹³*Ibid.*

¹⁴*Card v. Hines*, 33 Fed. 189.

¹⁵*The Falls of Keltie*, 114 Fed. 357.

¹⁶*The Falls of Keltie*, 114 Fed. 357.

¹⁷See post, § 1201, note.

¹⁸See *Harrison v. Hughes*, 119 Fed. 997; *Keyser & Co. v. Jurvelius*, 122 Fed. 218, 58 C. C. A. 664.

¹⁹*The New Brunswick*, 125 Fed. 567.

²⁰*The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139.

²¹*The Oregon*, 133 Fed. 616, 68 C. C. A. 603.

²²*Ante*, § 950.

ing certain kinds of interrogatories.¹ Under the rule a libellant in a suit against a corporation may attach to his libel interrogatories to be answered by an officer of the corporation named therein.² And such interrogatories may be not only as to personal knowledge of such officers but also as to their official information.³ They must be as to material matters and must be definite.⁴ When tending to elicit proper facts bearing on the case, they may be objected to only when the answer may incriminate.⁵ The provision in the foregoing rule that interrogatories must be propounded at the close of the libel precludes them from being propounded at any other stage in the proceedings; nor can the district courts by rule provide for the propounding of them subsequently.⁶ One who has failed to propound interrogatories in the libel should seek relief under the provisions of the 51st admiralty rule.⁷ Where libel fails to make specific charges of negligence the defendant may annex to his answer interrogatories for such charges.⁸

§ 1199. Libel and information for seizure.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

22nd admiralty rule.

"Libel" and "information" have been used interchangeably in forfeiture cases;¹¹ but the better practice is perhaps to use "libel of information" as in the foregoing rule. While the technical precision of a common law indictment is not necessary,¹² All the material facts constituting the offense

¹Post, § 1263.

²Bock v. International Nav. Co. see post, § 1267.

³Ibid.

⁴In re Knickerbocker, etc. Co. 136

Fed. 956.

⁵Dana v. Cosmopolitan, etc. Co.

131 Fed. 158.

⁶The Edwin Baxter, 32 Fed. 296.

⁷The Edwin Baxter, 32 Fed. 296;

see post, § 1267.

⁸Stoffregan v. The Mexican Prince, 70 Fed. 246; see post, § 1265.

¹¹The Samuel, 1 Wheat. 13, 4 L. ed. 23.

¹²The Emily & Caroline, 9 Wheat. 386, 6 L. ed. 116.

should be averred,¹³ and a general statement of the grounds on which forfeiture is claimed is insufficient.¹⁴ Sufficient should be averred to show clearly a case within the statute.¹⁵ It is generally sufficient to aver the offense in the words of the statute;¹⁶ unless the statute is general in form and covers a whole class of individual subjects.¹⁷ Prior to the adoption of the admiralty rules it was held that the averment "Contra formam statuti" was not always necessary,¹⁸ and the holding has since been adhered to notwithstanding the rule.¹⁹ The absence of the averment is in any event, merely a formal defect, which would not warrant a reversal on appeal.²⁰ The libel should show a subsisting seizure;¹ and the time and place;² but need not seek forfeiture upon the precise ground alleged for the seizure.³ Facts constituting a defense to the seizure need not be stated in the libel.⁴ In cases of seizure, failure to state time and place thereof, renders libel defective and it may be objected to and dismissed at any stage in the proceedings.⁵

§ 1200. Exceptions to libel and allowance thereof.

Exceptions may be taken to any libel, . . . for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel . . . the same is found.

36th admiralty rule promulgated 1844.

The above rule also covers exceptions to the answer.⁶ The exception in admiralty performs a variety of functions. Not only is it used where ir-

¹³*Brig Caroline v. United States*, 7 Cranch. 500, 3 L. ed. 417; *The Cherokee*, 5 Fed. Cas. 549; *Eighteen*, etc. Gal. Dist. Spirits, 5 Ben. 4, Fed. Cas. No. 4,317; *The Caroline*, 1 Brock, 384, Fed. Cas. No. 2418; *United States v. 25 etc. Bbls. Alcohol*, 50 Int. Rev. R. 17, Fed. Cas. No. 16,562.

¹⁴*Schooner Anne v. United States*, 7 Cranch, 572, 3 L. ed. 442; *Schooner Hoppet v. United States*, 7 Cranch, 389, 3 L. ed. 380.

¹⁵*The Samuel*, 1 Wheat. 15, 4 L. ed. 23; *The Emily & Caroline*, 9 Wheat. 386, 6 L. ed. 116.

¹⁶*The Palmyra*, 12 Wheat. 13, 6 L. ed. 531; *The Emily & Caroline*, 9 Wheat. 386, 6 L. ed. 116; *Gelston v. Hoyt*, 3 Wheat. 330, 4 L. ed. 381; *United States v. Brig Neurea*, 19 How. 94, 95, 15 L. ed. 531.

¹⁷*The Mary Ann*, 8 Wheat. 389, 5 L. ed. 641.

¹⁸*The Merino*, 9 Wheat. 401, 6 L. ed. 118.

¹⁹*See The Idaho*, 29 Fed. 189; *American Ins. Co. v. Johnson*, 1 Blatchf. & H. 15, Fed. Cas. No. 303; *United States v. Parynthia Davis*, 1 Cliff. 535, Fed. Cas. No. 16,003.

²⁰*The Confiscation Cases*, 20 Wall. 111, 22 L. ed. 324; *The Merino*, 9 Wheat. 401, 6 L. ed. 118.

¹*The Washington*, 4 Blatchf. 101 Fed. Cas. No. 17,221; *United States v. Ninety-two, etc. Spirits*, 8 Blatchf. 480, Fed. Cas. No. 15,892.

²*United States v. One Raft*, 13 Fed. 796, 3 Hughes, 404.

³*Wood v. United States*, 16 Pet. 342, 10 L. ed. 987.

⁴*Cargo of Brig Aurora v. United States*, 7 Cranch, 389, 3 L. ed. 378.

⁵*United States v. One Raft*, 13 Fed. 796, 5 Hughes, 404.

⁶*Post*, § 1264.

relevancy, impertinence or scandal appear in the libel, but it also may be made to answer the purpose of a demurrer or plea.⁷ The respondent may by an exception set up the failure of libel to aver a breach of the contract sued upon, and when so used the exception is substantially a demurrer.⁸ So it may be used to raise the contention that a want of jurisdiction appears upon the fact of the libel.⁹ Where respondent seeks to bring to the attention of the court facts which do not appear from the libel he may append exceptive allegations to his exception.¹⁰ These exceptive allegations correspond to pleas in abatement and pleas in bar of the courts of common law and equity.¹¹ However, courts of admiralty are averse to technicalities in the pleadings before them, and will entertain defenses in the form of exceptive allegations which might more properly have been offered in a special answer.¹² Failure to except is a waiver of objections for misjoinder of causes of action or parties.¹³

§ 1201. Amendment of libels and informations.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

24th admiralty rule promulgated 1844.

Amendments of the libel are liberally allowed in admiralty, even in quasi-criminal proceedings like forfeiture cases.¹⁴ They may be allowed in the exercise of a sound discretion any time prior to final determination of the cause.¹⁵ Before answer or evidence taken substitution of an amended and supplemental libel may be permitted though some of the allegations are at variance with those in the original.¹⁶ After exception taken, libellant may elect to amend without proceeding to a hearing on the exception.¹⁷

⁷Dennis v. Slyfield, 117 Fed. 474, 7 Cranch, 500, 3 L. ed. 417; Schooner Anne v. United States, 7 Cranch, 572, 3 L. ed. 442; The Haytian Republic, 57 Fed. 508.

⁸Dennis v. Slyfield, 117 Fed. 474, 3 L. ed. 442; The Haytian Republic, 57 Fed. 508. For amendment after exception sustained for want of jurisdiction, see Graham v. Oregon, etc. Co. 134 Fed. 692.

⁹Prince, etc. Co. v. Lehman, 39 Fed. 704, 5 L.R.A. 464.

¹⁰The Seminole, 42 Fed. 924.

¹¹The Haytian Republic, 57 Fed. 509. ¹⁵O'Connell v. One, etc. Bales Hemp, 75 Fed. 409; The Edwin Post, 6 Fed. 206.

¹²The Haytian Republic, 57 Fed. 509. ¹⁶O'Connell v. One, etc. Bales Hemp, 75 Fed. 409.

¹³Merritt, etc. Co. v. Chubb, 113 Fed. 175, 51 C. C. A. 119. ¹⁷Town v. Western Metropolis, 28

¹⁴Brig Caroline v. United States, How. Pr. 283, Fed. Cas. No. 14,114;

After answer amendments have been permitted if not inconsistent with the original libel;¹⁸ if inconsistent, however, they will not be permitted.¹⁹ There are no technical rules as to variance in admiralty pleading;²⁰ and at the hearing amendments to make the libel conform to the proofs are liberally allowed.²¹ Libellant may after the theory of his case,¹ and amend so as to change his grounds of relief from tort to contract,² or he may change a suit against the vessel and owner, to one against the vessel alone.³ He may amend by adding a prayer for allowance of interest after all the issues except the amount of damages have been determined.⁴ After damages have been determined an amendment to increase the claim has been refused.⁵ Amendment will be refused after trial, when libellant has admitted the facts and no mistake has been shown.⁶ Amendments making new or different parties libellant⁷ or respondent⁸ have been permitted. Libel may also be amended as to parties, by changing the character in which the libellant sues.⁹

But amendments are limited by due consideration of the rights of the opposite party or other parties interested in the suit and may be denied if these rights would be prejudiced.¹⁰ After release of a vessel on stipulation amendment of the libel setting up a new and distinct claim should not be allowed.¹¹

Amendments of mere form not going to the merits of the case, nor prejudicial, will not entitle the opposite party to costs.¹² After answer and an exception based upon a defect in the libel, terms have been imposed as a condition of the allowance of an amendment.¹³

Newell v. Norton, 3 Wall. 257, 18 L. ed. 271; The Samuel Marshall, 49 Fed. 757.

¹⁸The Monte A. 12 Fed. 331. See Rosenthal v. The Louisiana, 37 Fed. 264.

¹⁹The General Sedgwick, 29 Fed. 606; The Zodiac, 5 Fed. 220.

²⁰The Gazelle, 128 U. S. 487, 32 L. ed. 496, 9 Sup. Ct. Rep. 139; Davis v. Adams, 102 Fed. 520, 42 C. C. A. 493; Dupont v. Vance, 19 How. 172, 15 L. ed. 584. Compare: Harrison v. Hughes, 119 Fed. 997.

²¹Davis v. Adams, 102 Fed. 520, 42 C. C. A. 493; The Imogene M. Terry, 19 Fed. 463; The Maryland, 19 Fed. 557; The City of New Orleans, 33 Fed. 683.

¹See The Rapid Transit, 52 Fed. 320.

²Davis v. Adams, 102 Fed. 520, 42 C. C. A. 493.

³The San Rafael, 141 Fed. 270, (C. C. A.)

⁴The J. E. Trudeau, 54 Fed. 907, 4 C. C. A. 657.

⁵See New Haven Steamboat Co. v. The Mayor, 36 Fed. 716.

⁶Burrill v. Crossman (D. C.), 65 Fed. 104.

⁷See The Beaconsfield, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. Rep. 860; The Eliza Lines, 61 Fed. 308.

⁸Boden v. Demwolf, 56 Fed. 846.

⁹The Manhasset, 19 Fed. 430.

¹⁰The Corozal, 19 Fed. 655; O'Connell v. One etc. bales of Hemp, 75 Fed. 408; The Keystone, 31 Fed. 412; The Alanson Sumner, 28 Fed. 670.

¹¹The Iona, 80 Fed. 933, 26 C. C. A. 261; The Corozal, 19 Fed. 655.

¹²Olsen v. The Edwin Post, 6 Fed. 314.

¹³The George Taulane, 22 Fed. 799.

§ 1202. When process issued and by whom served.

No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

1st admiralty rule, promulgated December Term, 1844.

The power of the courts of admiralty to issue process, is subject to restraint by statute,¹⁶ and to such rules as may be laid down by the Supreme Court.¹⁷ The general statutory provisions respecting Federal process and its form have been elsewhere considered.¹⁸ Original process cannot be served by private persons, though subpoenas may be.¹⁹ Seizure of the res and publication of the monition is equivalent to service of process.²⁰ Monition may be served on agent of nonresident defendant in accordance with the State law.¹ The general subject of service of process from the Federal courts is discussed in another chapter.²

§ 1203. Process of arrest, attachment and monition in suits in personam.

In suits in personam the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein;^[a] or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.^[b]

2nd admiralty rule, promulgated December Term, 1844.

[a] Arrest and attachment.

The rule gives a choice of three forms of process. Of these the first is even less frequently used than are the simple monition and warrant of arrest with alternative attachment. As is elsewhere shown attachment as a means of compelling appearance by an absent defendant, usually

¹⁶U. S. v. Schooner Little Charles, 1 Brock. 380, Fed. Cas. No. 15,163.

¹⁷Marshall v. Bozin, 7 N. Y. Leg. Obs., Fed. Cas. No. 9,125.

¹⁸Ante, §§ 836 et seq.

¹⁹Schwabaker v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501.

²⁰Taylor v. Carryl, 20 How. 599, 15 L. ed. 1028.

¹Ins. Co. of N. A. v. Leyland, 139 Fed. 67.

²Ante, §§856 et seq.

termed process of foreign attachment, is not permitted under the judiciary act, in the Federal courts sitting at law or in equity, even though local State laws accord the remedy in the State courts.⁴ It was at first considered that the Federal courts of admiralty were similarly restricted.⁵ But the contrary has long been settled and the right of attachment amply sustained.⁶ This right has existed in admiralty since very ancient times and is not dependent upon the common law for its origin.⁷ It is not permitted, however, until a warrant of arrest has issued and it is shown that the defendant is out of the jurisdiction or cannot be found.⁸ This rule is strictly adhered to and the mere fact that defendant is immune from arrest by virtue of a State law will not justify attachment.⁹ But a return of the marshal, declaring that a reasonable and unsuccessful effort was made to serve defendant in person, may not be disputed for the purpose of vacating an attachment.¹⁰ Attachments may be of credits and effects in the hands of third parties.¹¹ Ships and other tangible property are effects within the meaning of the rule.^{11½}

[b] Monition.

Monition corresponds generally to the summons in an ordinary civil suit and its issuance if sought, must be prayed for in the libel. It may issue against a foreign corporation in a district where that corporation has a local agent.¹² Service of monition in admiralty which conform to the mode prescribed by a State statute regulating service of summons in the State courts, will be held good.¹³ Service by leaving a copy of the citation with a servant at the defendant's residence has been held insufficient.¹⁴

§ 1204. In general warrant of arrest not issued for more than five hundred dollars.

In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five

⁴Ante, § 853.

⁵Ex parte Graham, 3 Wash. C. C. 456 Fed. Cas. No. 5,657; Wilson v. Pierce, 15 Law. Rep. 137, Fed. Cas. No. 17,826.

⁶Manro v. Almeida, 10 Wheat. 473, 6 L. ed. 369; Atkins v. Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; New Eng. Ins. Co. v. Detroit etc. Navigation Co. 18 Wall 307, 21 L. ed. 846; Cushing v. Laird, 107 U. S. 69, 27 L. ed. 391, 2 Sup. Ct. Rep. 196; Devoe Mfg. Co. v. Petit, 103 U. S. 401, 27 L. ed. 764, 2 Sup. Ct. Rep. 894; Ex parte Louisville Underwriters, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587.

⁷Manro v. Almeida, 10 Wheat. 487-493, 6 L. ed. 369.

⁸Chiea v. Conover, 36 Fed. 334.

⁹The Bremena v. Card, 38 Fed. 144.

¹⁰Harriman v. Rockaway, etc. Co. 5 Fed. 461.

¹¹Manro v. Almeida, 10 Wheat. 493, 6 L. ed. 396. In Re Louisville Underwriters, 134 U. S. 490, 33 L. ed. 991, 10 Sup. Ct. Rep. 587.

^{11½}The Alpena, 7 Fed. 361.

¹²In Re Louisville Underwriters, 134 U. S. 493, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; See ante, § 1198.

¹³Insurance Co. v. Leyland, 139 Fed. 67; In re Louisville Underwriters, 134 U. S. 493, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; Doe v. Springfield, etc. Co. 104 Fed. 686, 44 C. C. 128. Compare § 853, ante.

¹⁴Walker v. Hughes, 132 Fed. 885, 885.

hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

7th admiralty rule promulgated December term 1844.

In cases where a less amount is involved the warrant will be issued by the clerk as matter of course.

§ 1205. Bail in cases of arrest, stipulation and execution thereon.

In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in an appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

3rd admiralty rule promulgated December term 1844.

As the libellant has nothing to do with the taking of bail it is the duty of the marshal to see that the sureties are sufficient and that the stipulation is duly executed. To entitle to a discharge from arrest the bond should be not only for costs, but also sufficient to satisfy decree made against claimant,¹⁷ in the court which shall ultimately decide the cause.¹⁸ A party cannot be held to bail in two places at the same time for the same cause of action.¹⁹ Upon the decree, execution issues summarily against stipulators, their submission thereto being a condition to such bonds.²⁰ The form and execution of stipulations are elsewhere considered.¹

§ 1206. — to be taken whenever required by laws of State.

In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State courts.

Part of 47th admiralty rule promulgated December term 1850.⁴

¹⁷Gardner v. Isaacson, Abb. Adm. 141, Fed. Cas. No. 5,230.

¹⁸United States v. Schooner Little Charles, 1 Brock, 380, Fed. Cas. No. 15,613.

¹⁹Bingham v. Wilkins, Crabbe, 50 Fed. Cas. No. 1,416.

²⁰Gaines v. Travis, Abb. Adm. 422, Fed. Cas. No. 5,180.

¹See post § 1216.

⁴See 10 How. v.

The rule, as a whole, both the foregoing part, and that part dealing with imprisonment for debt⁵ being authorized by statute,⁶ arrest under it has the effect of an arrest under and by virtue of a statute.⁷ Bail is never allowed in Federal proceedings in admiralty where it would be refused in a State court; if, however, it is allowed by the latter it may be demanded in a Federal court as a matter of right.⁸ Defendant cannot be required to give a bond conditioned for the payment of money awarded by the final decree, where under the laws of the State he is entitled to his discharge from arrest merely upon giving an undertaking that "he will at all times render himself amenable to the process of the court."⁹

§ 1207. — result where imprisonment for debt abolished.

Imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter abolished upon similar or analagous process issuing from a State court.

Part of 47th admiralty rule promulgated December term 1850.¹²

It would seem that a claim for unliquidated damages is not a "debt" within the meaning of the foregoing section of the rule, and hence that admiralty may issue warrant for arrest in such cases, although the State law prohibits imprisonment for debt.¹³

§ 1208. — reduction of bail.

In all suits in personam, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor.

Part of 6th admiralty rule promulgated December term 1844.

The omitted portion of the above rule provides for new sureties in case of insolvency.¹⁴

§ 1209. Duties and liabilities of garnishees on foreign attachment.

In cases of foreign attachment, the garnishee shall be required to

⁵See post, § 1207.

⁶R. S. §§ 990, 991. That statute applies to admiralty process, see *The Carolina*, 14 Fed. 424.

⁷*Gaines v. Travis*, Abb. Adm. 422, Fed. Cas. No. 5,180; *Marshall v. Bazier*, 7 N. Y. Leg. Obs. 342, Fed. Cas. No. 9,125.

⁸*Beers v. Houghton*, 9 Pet. 329, 9 L. ed. 145.

⁹*Stone v. Murphy*, 86 Fed. 153.

¹²See 10 How. v.

¹³*Hanson v. Fowle*, 1 Sawy. 539, Fed. Cas. No. 6,042, and *Bolden v. Jensen*, 69 Fed. 746. But see contra *the Carolina*, 14 Fed. 424, *Chiesa v. Conover*, 36 Fed. 334, and *The Bremina v. Card*, 38 Fed. 144.

¹⁴Post, § 1224.

answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

37th admiralty rule, promulgated December term, 1844.

§ 1210. Process by arrest of ship, etc. in suits in rem.

In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods or other thing into his possession for safe custody,^[a] and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.^[b]

9th admiralty rule promulgated December term 1844.

[a] Arrest and seizure.

Suit in rem is in substance, a suit against all persons having any interest in the res and all are bound by the decree, so far as the res proceeded against is concerned. The same cause of action may support both a suit in rem and a suit in personam.¹⁷ In order to institute and perfect proceedings in rem, it is necessary that the thing should be actually or constructively within the reach of the court.¹⁸ Moreover, the thing must be subject to process. As the sovereign is not suable except by consent,¹⁹ government property is exempt, though it must clearly appear that it is government property and in possession of the proper persons.²⁰ Moreover, exemption can only be claimed by the government itself or its agent.¹ This exemption will also be extended by comity, to property of a foreign government in the public service.² It has also been held against public policy to permit libellants to arrest a municipal ice boat used in keeping harbor waters clear and disable her from her duties, though the personal liability of her owners is not affected by this exemption.³

¹⁷See post, § 1240, et seq.

¹⁸The Brig Ann, 9 Cranch, 291, 3 L. ed. 735.

¹⁹Ante, § 2 [1].

²⁰Long v. The Tampico & Progresso, 16 Fed. 491.

¹Id.

²Id.

³The Fidelity, 16 Blatchf. 569 Fed. Cas. No. 4,758; The F. C. Latrobe, 28 Fed. 377.

Just what is a sufficient taking of the res, by the marshal, in order to constitute an arrest and give the court jurisdiction is not entirely clear and would seem to depend on the nature of the res and its location. Courts have gone so far as to hold that where the res was in possession of the port collector of customs, service of the monition upon him by the marshal, was sufficient.⁴ On the other hand there is authority holding that there must be exclusive custody and control.⁵ Service of copy of the monition on part owner of a vessel and at the residence of the captain has been held not a sufficient seizure while service on holder of res has been held sufficient.⁶ Where, however, the vessel is already in the custody of the marshal his receipt of a warrant of arrest in another suit, with intent to levy it, is constructive levy.⁸ Arrest is unnecessary where the claimant voluntarily gives a stipulation, and the court has jurisdiction to proceed just as if the vessel had been first seized, and the stipulation then given.⁹ The fact that the warrant did not properly describe the property, is immaterial when the marshal has not been thereby misled.¹⁰ If the warrant of arrest is premature the arrest will be retained, and compensation made in costs for the fact that it was premature.¹¹ The warrant of arrest must be regular and if issued by the clerk in the absence of the judge contrary to a rule of court, it is void.¹² In cases also where the warrant issues as of course on the filing of the libel, the libellant may be held for damages, where he might have known that he had no right to the warrant.¹³ It is the marshal's duty to retain the specific res libeled, and he is responsible for its proper custody.

[b] Notice and publication thereof.

Since the decree in an action in rem is good against the whole world, it is only just that the marshal should give notice of the arrest, and publication openly, so that all persons interested in the res may be enabled to take the proper steps to protect their rights.¹⁶ Seizure is said to give construction notice to all parties interested.¹⁷ In actions in rem in general there is no stated time during which the notice must be published. In cases of seizure, however, under the revenue laws, the court must cause fourteen days' notice to be given, setting forth the time and place of the seizure,

⁴Two Hundred etc. Tons of Salt, 5 Fed. 216; *Jorgensen v. Casks of Cement*, 40 Fed. 606.

⁵*Taylor v. Carryl*, 20 How. 600, 15 L. ed. 1030; *The Rio Grande*, 23 Wall. 464, 23 L. ed. 159.

⁶*Brennan v. The Anna P. Dorr*, 4 Fed. 459.

⁷*Snow v. One Hundred etc. Tons of Iron*, 11 Fed. 517.

⁸*Kodiak, etc. Co. v. Haytian Republic*, to 60 Fed. 292.

⁹*The Frank Vanderkerchen*, 87 Fed. 763.

¹⁰*Lands v. A Cargo of Coal*, 4 Fed. 478.

¹¹*American, etc. Barge Co. v. Chesapeake etc. Co.* 115 Fed. 669, 53 C. C. A. 301.

¹²*Deas v. The Berkeley*, 58 Fed. 920.

¹³*Briggs etc. Co. v. Fleming*, 40 Fed. 595.

¹⁶*See In re Fassett*, 142 U. S. 482, 35 L. ed. 1088, 12 Sup. Ct. Rep. 295.

¹⁷*The Mary*, 9 Cranch, 144, 3 L. ed. 678; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 383. The commander-in-chief, 1 Wall. 52, 17 L. ed. 612.

and time and place of the trial.¹⁸ By analogy to this provision it is the practice of the Southern District of New York to require the same publication in all actions in rem.

§ 1211. — how possession of ship's tackle etc. to be obtained from third persons

In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same may be delivered over into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

8th admiralty rule promulgated December term, 1844.

This rule also applies where the property has been sold by the third party, and the court may require the one holding the proceeds to pay the same into court.²⁰

§ 1212. — how freight money and other property brought into court in suits in rem.

In case of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

38th admiralty rule promulgated December term 1844.

Generally where a lien exists in rem it attaches to freight money and other proceeds, as well as to the res itself.³ The proper process to bring

¹⁸R. S. § 923; post, § 1385.

²⁰The George Prescott, 1 Ben. 7
Fed. Cas. No. 5,339.

Twelve Dollars, 5 Fed. Cas. No. 674;
Sheppard v. Taylor, 5 Pet. 710, 8 L.
ed. 282.

³Church v. Seven hundred and

Fed. Proc.—72.

property into court is by monition and not by execution against the party in possession.⁴ Payment of money into court is considered elsewhere.⁵

§ 1213. Form of process in petitory and possessory suits.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

20th admiralty rule, promulgated 1844.

The court will not interfere with one half owners possession when the other who had charge of the vessel left it in an unsafe condition.⁷ The above rule contemplates a proceeding that is both in personam and in rem;⁸ and constitutes the only case for which the admiralty rules permit a proceeding against the ship and owner in the same libel.⁹

⁴The Grand Para, 10 Wheat 497, 6 L. ed. 375; Sheppard v. Taylor, 5 Pet. 675, 8 L. ed. 269.

⁸The S. C. Ives, Newb. 205, Fed. Cas. No. 7958; Briggs v. Taylor, 84 Fed. 683, 28 C. C. A. 518.

⁵See post, § 1287.

⁹See The Corsair, 145 U. S. 342,

⁷The Ocean, 1 Sprague, 535 Fed. Cas. No. 10,401.

CHAPTER 36.

ADMIRALTY STIPULATIONS, SECURITY AND PROPERTY OR MONEY IN CUSTODY.

- § 1216. Stipulations—mode of giving and taking.
- § 1217. —all stipulations to be so given and taken.
- § 1218. Power of judge after seizure to take delivery bond in vacation.
- § 1219. Ship arrested to be delivered to claimant on stipulation or sold.
- § 1220. On receiving bond, marshal to stay seizure or release property seized.
- § 1221. Right to give stipulations in advance of suit, to prevent seizures.
- § 1222. Perishable goods seized, to be sold and delivered on bond to claimant.
- § 1223. Bond for dissolution of attachment and execution thereon.
- § 1124. New sureties upon bail bond or stipulation or upon attachment bond.
- § 1225. When defendant to give security for costs.
- § 1226. Security for costs by respondent on cross libel.
- § 1227. Stipulation and security by intervenors.
- § 1228. Claimant in suits in rem to give stipulation for costs.
- § 1229. Stipulation required on petition of claimant or respondent in collision cases.
- § 1230. Money in registry of court, how and where deposited.
- § 1231. Intervenors for money in registry of court.

§ 1216. Stipulations—mode of giving and taking.

Bonds, or stipulations in admiralty suits,^{[a]-[d]} may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.^[e]

Fifth Admiralty Rule as amended May 6, 1872.¹

[a] Stipulations in general.

The various kinds of stipulations in admiralty are given and taken in the same general way, and sureties are required in all cases. A deposit

¹See 13 Wall. xiv.

of money however may be made by the party in lieu thereof.³ The right of admiralty courts to take *fide-jussory* caution or stipulation in cases in *rem* seems established,⁴ even in possessory suits.⁵ It has also been deemed a sound exercise of discretion to allow release on stipulation in cases of seizure for forfeitures, where the government was not ready for a hearing and there was no reason to suppose that the vessel would again violate the law.⁶ The stipulation is security for the value of the property,¹⁰ except in attachment proceedings under the fourth admiralty rule when it would seem to be security for the amount of the claim.¹¹ Stipulations are interpreted as to extent of responsibility by the intention of the court and not by the intention of the parties.¹³ If the *res* arrested is still in custody when intervening petitions are filed it cannot be released until stipulation is given to answer all the libels on file.¹⁴ One stipulation when substituted for another, does not become inoperative on appeal.¹⁵ Additional security has been ordered by the court,¹⁶ but it cannot be demanded after the *res* has been released on stipulation.¹⁷ Moreover where the parties have agreed on stipulations out of court a motion to reduce the amount, made when the vessel is out of the jurisdiction and before the hearing, will be denied.¹⁸

[b] — form of stipulations.

Stipulations are not subject to rigid rules.¹ No distinct form of stipulation is required though it should distinctly assume the obligation. However the mere omission to mention the sum to be paid in case of default does not render a stipulation invalid.² When a vessel is seized on an invalid warrant of arrest, a recital in the stipulation that the claimant and his surety personally appeared and submitted themselves to the jurisdiction of the court is not a waiver of the illegality and does not operate as an appearance in the suit.³ A defect in the execution of the stipulation is deemed waived unless excepted to before the close of the term next after becoming known.⁴

³See ante, § 1215.

⁴The Alligator, 1 Gall. 145, Fed. Cas. No. 248.

⁵The Poconoket, 61 Fed. 109.

⁶The Three Friends, 78 Fed. 173. See also United States v. Ames, 99 U. S. 39, 25 L. ed. 295. But see The Mary N. Hogan, 17 Fed. 813.

¹⁰United States v. Ames, 99 U. S. 39, 25 L. ed. 295; The Palmyra, 12 Wheat. 1, 6 L. ed. 531; The Wanata, 95 U. S. 611, 24 L. ed. 461; The Steamer Webb, 14 Wall. 418, 20 L. ed. 774; The Oregon, 158 U. S. 209, 39 L. ed. 943, 15 Sup. Ct. Rep. 804; The Vanderkerchen, 87 Fed. 765.

¹¹Pope v. Seckworth, 46 Fed. 858. See ante, § 1209.[a]

¹³The Beaconsfield, 158 U. S. 311, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

¹⁴The Oregon, 158 U. S. 210, 39 L. ed. 943, 15 Sup. Ct. Rep. 804.

¹⁵The Lady Pike, 96 United States. 465, 24 L. ed. 672.

¹⁶Morrison v. District Court, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246. See also ante, § 1216.

¹⁷The Mutual, 78 Fed. 144.

¹⁸The Monarch, 30 Fed. 283.

¹The Beaconsfield, 158 U. S. 310, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

²The Haytian Republic, 154 U. S. 118, 38 L. ed. 930, 14 Sup. Ct. Rep. 992.

³The Berkeley, 58 Fed. 920.

⁴The Infanta, Abb. Adm. 327, Fed. Cas. No. 7,031.

[c] — effect of release on stipulation.

Since the stipulation is a mere substitute for the thing itself,⁶ the stipulators are subject to the exercise of all the powers which the court could exercise if the property were still in its custody.⁷ But where the res has once been delivered to the owner on appraisalment and stipulation, he cannot claim that it is of less value in his hands, or that he has discharged other liens, thereby diminishing the value for which the owners were personally liable.⁸ The vessel returns to the claimant subject to the liens of all who were not parties to the action before the discharge was made. And the same rule applies where only part of the res has been released.¹¹ A vessel cannot be released until stipulation is given covering all the libels on file;¹² but when once released a new warrant of arrest is necessary for subsequent libels.¹³ Where however, a vessel seized for forfeiture, has once been released on bond, it cannot be rearrested in a different district under a libel alleging other violations committed during the same period.¹⁴

[d] — rights and liabilities of stipulators and sureties.

A stipulation continues to be a charge against the obligors until the final decree, even though a new stipulation has been entered into with sureties on appeal.¹⁷ It will cover costs if conditioned to respond to the decree rendered, even though a cost bond has also been given.¹⁸ A bond running to cargo owners will also render the sureties liable to the insurer of the cargo.¹⁹ On final decrees the obligors are liable for interest only from its date.²⁰ In general they are not liable for interest except on default in complying with the terms of the stipulation.¹ The right of subrogation exists in favor of the surety when he has paid the decree.³ Where claimant has given a stipulation in a large sum because a large or excessive amount was claimed in the libel, he cannot recover from libellant the compensation he was obliged to pay the sureties for the excessive bond.⁴

⁶United States v. Ames, 99 U. S. 36, 25 L. ed. 295.

⁷The Palmyra, 12 Wheat. 10, 6 L. ed. 531 The Wanata, 95 U. S. 611, 24 L. ed. 261; United States v. Ames, 99 U. S. 36, 25 L. ed. 295.

⁸The Ship Virgin, 8 Pet. 554, 8 L. ed. 1036.

¹¹Langdon Cheves, 2 Mason, 58, Fed. Cas. No. 8,063; The Union, 4 Blatchf. 90, Fed. Cas. No. 14,346; The Antelope, 1 Ben. 521, Fed. Cas. No. 481; The Haytian Republic, 57 Fed. 508; Id. 154 U. S. 118, 38 L. ed. 930, 14 Sup. Ct. Rep. 992; The Oregon, 158 U. S. 186, 39 L. ed. 943, 15 Sup. Ct. Rep. 804.

¹²Hawgood, etc. Co. v. Dingman, 94 Fed. 1014, 36 C. C. A. 627.

¹³The Oregon, 158 U. S. 210, 39 L.

ed. 943, 15 Sup. St. Rep. 804; The Oregon, 158 U. S. 210, 39 L. ed. 943, 15 Sup. Ct. Rep. 804.

¹⁴The Haytian Republic, 59 Fed. 476, 8 C. C. A. 182, Affirming 57 Fed. 508.

¹⁷The Belgenland, 16 Fed. 430.

¹⁸The Madgie, 31 Fed. 926.

¹⁹The Livingstone, 104 Fed. 922.

²⁰The Manitoba, 122 U. S. 102, 30 L. ed. 1095, 7 Sup. Ct. Rep. 1158.

¹The Ann Caroline, 2 Wall. 538, 17 L. ed. 768; The Webb, 14 Wall. 406, 20 L. ed. 774; The Wanata, 95 U. S. 600, 24 L. ed. 461; The Sydney, 47 Fed. 260. But see The Belle, 5 Ben. 57, Fed. Cas. No. 1,270.

³The Madgie, 31 Fed. 928.

⁴The Stelvio, 30 Fed. 509.

The obligation of a stipulator is the same as that of a surety, although not subject to the same rigid rules of common law.⁶ And is limited to the terms of the contract;⁷ as interpreted by the court rather than by the parties.⁸ Hence stipulators on a bond for the release of a vessel cannot be held for more than the amount assumed in the stipulation as the value of the vessel, with costs;⁹ and a decree in excess of that sum will be modified accordingly.¹⁰ Nor can stipulators for costs or value be held beyond the amount stipulated, except in case of their own default.¹¹ The liability of stipulators can never be enlarged so as to include claims of intervenors made after release.¹² But the destruction of the res does not discharge the obligors;¹³ nor are sureties discharged by failure to file formal claim or the omission of the principal's name from the bond.¹⁴ And where a joint bond is given by two alleged owners for the release of the vessel, one of them cannot avoid liability by pleading that he was not an owner.¹⁵ Nor can an agent signing the stipulation avoid liability by pleading his agency.¹⁶

The liability of sureties is not effected by any amendments which the court has power to allow.²⁰ So where actions in rem and in personam are brought jointly, the dismissal as to the master and pilot, does not effect the liability of the sureties for the release of the vessel.¹ Moreover the substitution of the real party in interest for a mere nominal party, will not avoid the stipulation.² But, the introduction of a new cause of action is something which the sureties were not bound to contemplate, and they will be released.³

[e] Mode of giving and taking.

Stipulation for discharge of a vessel must be taken at court or at chambers and never by the clerk.⁷ Where taken before the judge at chambers, notice thereof must be given to the marshal by writ of supersedeas

⁶The Beaconsfield, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

⁷The Ann Caroline, 2 Wall. 548, 17 L. ed. 833.

⁸The Beaconsfield, 158 U. S. 311, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

⁹The Ann Caroline, 2 Wall. 548, 17 L. ed. 833.

¹⁰The Steamer Webb, 14 Wall. 418, 20 L. ed. 774.

¹¹The Wanata, 95 U. S. 605, 24 L. ed. 461.

¹²The Oregon, 158 U. S. 206, 39 L. ed. 943, 15 Sup. Ct. Rep. 804;

The Willamette, 70 Fed. 880, 18 C. C. A. 366, 31 L.R.A. 715; Griswold v. The T. W. Snook, 51 Fed. 244.

¹³The Two Marys, 16 Fed. 697; Sawy. 102.

¹⁴Todd v. The Tulchen, 2 Fed. 600.

¹⁵Gomila v. Culliford, 20 Fed. 734.

¹⁶The Maggie, 33 Fed. 591.

²⁰Newell v. Norton, 3 Wall. 266, 18 L. ed. 271; United States v. Moseley, 8 Fed. 691, 7 Sawy. 265; Boden v. Demwolf, 56 Fed. 846; Fairgrieve v. Insurance Co. 112 Fed. 367, 50 C. C. A. 286.

¹Newell v. Norton, 3 Wall. 266, 18 L. ed. 271.

²The Beaconsfield, 158 U. S. 310, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

³The Beaconsfield, 158 U. S. 311, 39 L. ed. 993, 15 Sup. Ct. Rep. 860; The Iona, 80 Fed. 936.

⁷The Jeanie Landles, 17 Fed. 91, 9

issued by the clerk.⁸ But when taken before a commissioner it must be given to the marshal by order issued by the commissioner.⁹

§ 1217. — all stipulations to be so given and taken.

The stipulations required by the last preceding rule¹² [regarding intervenors], or on appeal, or in any other admiralty or other maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.¹³

Thirty-fifth Admiralty Rule, as amended May 6, 1872.¹⁴

§ 1218. Power of judge after seizure to take delivery bond in vacation.

In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel, or cargo, or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers, and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale, as are had in like cases when ordered in term time: Provided, That upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases.

R. S. § 940, U. S. Comp. Stat. 1901, p. 691.

Other statutory provisions respecting the powers of the courts of admiralty in vacation are contained in an earlier chapter.¹⁵

§ 1219. Ship arrested to be delivered to claimant on stipulation or sold.

In like manner [i. e., like the proceedings for delivery of perish-

⁸The *Jeanie Landles*, 17 Fed. 91, 9
Sawy. 102.

⁹The *Jeanie Landles*, 17 Fed. 91, 9
Sawy. 102.

¹²See post, § 1227.

¹³Ante, § 1218.

¹⁴See 14 Wall. xi.

¹⁵Ante, §§ 183, 368.

able goods¹], where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid;^[a] and if the claimant shall decline any such application then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.^[b]

Eleventh Admiralty Rule, promulgated December term, 1844.

[a] Delivery on appraisement and stipulation.

The right of the claimant to have vessel released on stipulation extends to possessory actions,³ and has even been allowed in cases of seizures for forfeitures under the United States laws.⁴ In general the rule is designed to apply in suits to recover pecuniary demands and should not be applied where it will defeat the object of the suit.⁵ Where ship is released on stipulation or appraisement, the claimant cannot be held liable to any greater extent, nor can he complain that the ship was worthless.⁶ If however appraisement has not been made, he may show that the stipulation was given under a misapprehension either as to the nature of the obligation or the value of the vessel, and it may be reduced.⁷ Rearrest of a vessel is allowed in cases of misrepresentation or fraud, or improvident release, before judgment only.⁸ Stipulation may be made by any or all of several claimants, but only those signing are held liable.⁹ It may also be made by a stranger to the libel, and he is bound thereby.¹⁰ Where claimant is unable to make stipulation however he is not entitled to have the vessel released, even where the suit has been decided in his favor and the libellant has appealed.¹¹ Where there is a dispute as to the value of the vessel, which is less than the libellant's claim, the bond will be required for the highest amount subject to the libellant's right to show the actual value on final hearing.¹² The general subject of stipulations is discussed elsewhere.¹³

[b] Sale.

The sale of a libeled vessel may be ordered before final decree, on the claimant's motion where the libellant does not object after due notice.¹⁵

¹Post, § 1222.

³The Poconoket, 61 Fed. 106.

⁴The Three Friends, 78 Fed. 173.

⁵The Mary N. Hogan, 17 Fed. 813.

⁶The Virgin, 8 Pet. 538, 8 L. ed. 1037.

⁷The Iris, 100 Fed. 104, 40 C. C. A. 301.

⁸The Hattie Belle, 65 Fed. 119.

⁹The Zodiac, 5 Fed. 220.

¹⁰Briggs v. Taylor, 84 Fed. 681, 28 C. C. A. 518.

¹¹The Bark Adolph, 5 Fed. 114.

¹²The Twilight, 138 Fed. 1005.

¹³See post, §§ 1216, et seq.

¹⁵The Nevada, 85 Fed. 681.

The price realized by such a sale would not establish the value of the vessel in a suit for limitation of liability.¹⁶ Sale of property and proceeds generally under any decree of admiralty courts is discussed elsewhere.¹⁷

§ 1220. On receiving bond, marshal to stay seizure or release property seized.

When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause.

Part of R. S. § 941, U. S. Comp. Stat. 1901, p. 692.

The remainder of R. S. § 941 is contained in the next section of the text.¹ R. S. § 938² provides for the appraisement and delivery of property seized by the government for violation of the revenue or other laws. The above provision has been construed as merely defining the power of the marshal to stay admiralty proceeding and not that of the court.³ Consequently release in case of seizure for forfeiture is not prohibited and has been allowed.⁴ A release bond for a vessel seized for violation of the revenue laws which contains no condition and is for double the value of the vessel, as if drawn under the above section, has been held valid under R. S. § 938.⁵ A bond given to secure the release of a vessel, is within the requirements of this section, even if given before actual arrest.⁶ On stipulation being given the res is returned to the owner;⁸ and it is discharged of the lien for which it was seized.⁹ It is still subject however to previous liens and subsequent accruing liens.¹⁰ The court will not order a redelivery to the marshal.¹¹ And the vessel cannot again be taken

¹⁶Idem.

¹⁷See post, § 1285.

¹Post, § 1221.

²Post, § 1387.

³The Three Friends, 78 Fed. 173.

⁴Id.

⁵The Haytian Republic, 57 Fed. Cas. No. 14,346.
508; Affirmed in 59 Fed. 476.

⁶Munks v. Jackson, 66 Fed. 571,
13 C. C. A. 641.

⁸1 Brown, 270, Fed. Cas. No. 10-482; The Union, 4 Blatchf. 90, Fed. Cas. No. 14,346.

⁹The Mutual, 78 Fed. 144.

¹⁰The Union, 4 Blatchf. 90, Fed.

Cas. No. 14,346.

¹¹Idem.

for the same cause of action.¹² Moreover a vessel seized under libel of forfeiture and released on bond is not subject to reseizure in a different district under a libel alleging other violations committed during the same period.¹³ The right of the vessel owner to give stipulation and retain possession extends under the above section to possessory actions as well as others.¹⁴ When the stipulation is unreasonable or exorbitant it may be reduced by the court if the stipulation agreement is made under the provisions of this section, but it is otherwise if it is made out of court.¹⁵ The question of release of vessel on appraisement and stipulation has been discussed in a previous section.¹⁷

§ 1221. Right to give stipulations in advance of suit, to prevent seizure.

The owner of any vessel may cause to be executed and delivered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by said bond or stipulation shall be at least double the aggregate amount claimed by the libelants in such suits which shall be begun and pending against said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease.

Amendment added to R. S. § 941, March 3, 1899, c. 441, 30 Stat. 1354, U. S. Comp. Stat. 1901, p. 692.

The remainder of R. S. § 941 is contained in a previous section of the text.¹ The above portion was enacted in 1899. Its purpose was "to prevent the blackmailing of vessels by seizing them just as they are leaving port."² In a suit between joint owners for the partition of a vessel, the

¹²The Mutual, 78 Fed. 144.

¹³The Haytian Republic, 59 Fed. 476, 8 C. C. A. 182.

¹⁴The Poconoket, 61 Fed. 106.

¹⁵The Monarch, 30 Fed. 283.

¹⁷See ante, § 1215.

¹Ante, § 1220.

²See H. R. report, 1691 (55th Cong. 3rd Sess.)

respondent may give bond for the delivery of the vessel and no seizure will be made.³

§ 1222. Perishable goods seized, to be sold and delivered on bond to claimant.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisal, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

Tenth Admiralty Rule, promulgated December term, 1844.

Where the res, is liable to deterioration or decay the proper course is to apply for a sale of the same.⁵ And it may be ordered even though the question at issue is one of jurisdiction, and final determination may be had on appeal within six months.⁶ The rule is also applicable to proceedings for limitation of liability, notwithstanding that attachment proceedings are pending against the res, in a state court.⁷ The sale of property and proceeds generally under any admiralty decree is discussed elsewhere.⁸

§ 1223. Bond for dissolution of attachment and execution thereon.

In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay

³The Emma B. 140 Fed. 770.

⁶The Willamette Valley, 63 Fed.

⁵The Nathaniel Hooper, 3 Sumn. 130.

542, Fed. Cas. No. 10,032.

⁷The Mendota, 14 Fed. 358.

⁸See post, § 1285.

the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Fourth Admiralty Rule, promulgated December Term, 1844.

On stipulation being made the suit proceeds in the same manner as if the defendant had been originally arrested and served, and there had been no attachment. The attachment is not dissolved by a subsequent appearance of the defendant and an offer to accept service.¹² The stipulation is a substitute for the amount claimed and not for the value of the property, as is the case in proceedings other than by attachment.¹³ Hence attached property cannot be released on stipulation conditioned for the payment of the value of such property where it is less than the debt sued for.¹⁴ Stipulations in general are discussed elsewhere.¹⁵ In proceedings in rem as well as in personam, execution may be awarded against the surety without a separate suit.¹⁶ So when the surety satisfies the execution he may be subrogated to the rights of the libellant.¹⁷

§ 1224. New sureties upon bail bond or stipulation or upon attachment bond.

In all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid,¹ if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

Part of sixth Admiralty Rule, promulgated 1844.

The foregoing rule does not cover suits in rem, but it has been followed and applied by analogy in such cases under the general power which rule 46² gives the district courts to regulate their practice.³ New sureties have been required on stipulations in rem when one of the originals has died or become insolvent;⁴ although the court has no power to require an additional bond after releasing a vessel on a stipulation duly given and accepted.⁵

¹²Harriman v. Rockaway, etc. Peer Co. 8 Fed. 94.

¹³United States v. Ames, 99 U. S. 35, 25 L. ed. 295.

¹⁴Pope v. Seckworth, 46 Fed. 858.

¹⁵See post, § 1216, et seq.

¹⁶Munks v. Jackson, 66 Fed. 571, 13 C. C. A. 641.

¹⁷The Madgie, 31 Fed. 926.

¹I. e. see 4th Admiralty rule, ante, § 1223.

²Ante, § 1197.

³The City of Hartford, 11 Fed. 89.

⁴The City of Hartford, 11 Fed. 89. See also The Virgo, 13 Blatchf. 255, Fed. Cas. No. 16,976; The Fred W. Lawrence, 88 Fed. 910.

⁵The Mutual, 78 Fed. 144.

§ 1225. When defendant to give security for costs.

In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

Twenty-fifth Admiralty Rule, promulgated 1844.

By the usual admiralty practice a stipulation for costs is generally required from the defendant on his appearing and answering in an action in personam.⁹ If however he appears without it and no exception is taken security is thereby waived.¹⁰

§ 1226. Security for costs by respondent on cross libel.

Whenever a cross libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross libel, unless the court, on cause shown, shall otherwise direct: and all proceedings upon the original libel shall be stayed until such security shall be given.

Fifty-third Admiralty Rule, promulgated December Term, 1868.¹⁵

The rule as to cross libels is given elsewhere.¹⁷ The object of the rule is not merely to compel an appearance, but to place the parties on an equality.¹⁸ It apparently does not apply to suits in personam, since the defendant in such suits gives no security, and it would be unjust to demand it from the respondent in the cross libel.¹⁹ Where however attachment is made in a suit in personam, the rule has been held to apply, the proceeding being then in effect a proceeding in rem.²⁰ Whether or not security shall be required rests with the court. Financial embarrassment has been held not sufficient cause for reducing the security required.¹ And the court has refused to order security given where there was unreasonable delay in making the demand.² Such refusal is not ordinarily reviewable.³ The

⁹Rawson v. Lyon, 15 Fed. 831.

¹⁰Pharo v. Smith, 18 How. Pr. 47, Fed. Cas. No. 11,062.

¹⁵See 7 Wall. v.

¹⁷Post, § 1272.

¹⁸Lochmore S. S. Co. v. Hagar, 78 Fed. 642.

¹⁹Franklin, etc. Refining Co. v. Funch, 66 Fed. 343. But see, Morse,

etc. Co. v. Luckenbach, (D. C.) 332.

²⁰Lochmore S. S. Co. v. Hagar, 78 Fed. 642.

¹Compagnie Universelle, etc. v. Belloni, 45 Fed. 587.

²Franklin, etc. Refining Co. v. Funch, 66 Fed. 342.

³Franklin, etc. Refining Co. v.

Funch, 73 Fed. 844, 20 C. C. A. 61,

fact that original libellant is the master and not owner will not excuse him from giving security in cross libel.⁴ Respondents in the cross libel are required to give security when the vessel is still in custody, as well as when it has been released on stipulation.⁵ Until security is given, proceedings will be stayed on the original suit. An appeal from an order however, refusing an application for security does not suspend proceedings.⁶

§ 1227. Stipulation and security by intervenors.

Every such intervenor [as is mentioned in the 34th admiralty rule⁷] shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

Part of thirty-fourth Admiralty Rule.

The thirty-fifth Admiralty rule prescribes the mode of taking such stipulations.⁹ The remainder of rule 34 is given elsewhere.¹⁰ On suit to recover a vessel seized by State officers, the State may appear and answer without filing the stipulation for costs above provided.¹¹

§ 1228. Claimant in suits in rem to give stipulation for costs.

Upon putting in such claim [i. e., a claim by or on behalf of the owner in suits in rem], the claimant shall file a stipulation, with sureties, in such sum as the courts shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

Part of Twenty-sixth Admiralty Rule, promulgated December Term, 1844.

The remainder of the rule is given elsewhere.¹⁴ Where an owner gives a stipulation for costs he is liable only for costs properly incident to the contest.¹⁵

§ 1229. Stipulation required on petition of claimant or respondent in collision cases.

Every such petitioner [i. e., every claimant or respondent in a collision case who petitions to bring in other parties alleged in fault] shall, upon filing his petition, give a stipulation, with suffi-

⁴Old Dom. S. S. Co. v. Kufahl, 100 Fed. 331.

⁵Empresa, etc. Vapor v. North, etc. Steam Navigation Co. 16 Fed. 502.

⁶The George Parker, 1 Flipp. 606, Fed. Cas. No. 5,334; The Ping On v. Blethen, 7 Sawy. 483, 11 Fed. 607;

Franklin, etc. Refining Co. v. Funch, 73 Fed. 844.

⁷See post, § 1268.

⁹See ante, § 1217.

¹⁰Post. § 1268.

¹¹The Hingston, 144 Fed. 560.

¹⁴Post. § 1258.

¹⁵The Vernon, 36 Fed. 113.

cient sureties, to pay to the libelant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bond or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libelant.

Part of Fifty-ninth Admiralty Rule, promulgated March 26, 1883.¹⁹

The first part of the Fifty-ninth Rule prescribes the right of a claimant or respondent to file a petition impleading others at fault in a collision case.²⁰

§ 1230. Money in registry of court, how and where deposited.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

Forty-second Admiralty Rule, promulgated December term, 1844.

§ 1231. Intervenor for money in registry of court.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene pro interesse suo for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice.^{[a]-[b]} And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

Forty-third Admiralty Rule, promulgated December Term, 1844.

[a] In general.

Intervenor is guilty of laches only when there is such delay as is inconsistent with good faith or operates to the injury of the party proceeded against.⁵ The court has general power on the sale of the vessel

¹⁹112 U. S. 743.

²⁰Post. § 1272.

⁵The Oregon, 73 Fed. 852.

and the payment of the funds into the registry to determine the claims and distribute the proceeds to all those who can show a vested interest, no matter how their claims originated.⁶ The court proceeds on the general principles of equity in such cases.⁷ The claim or interest of the intervenor must however not only be vested, but it must be in the nature of a lien either legal or equitable.⁸ And it must be specific and not general.¹⁰ So where the contract is merely personal, as a debt of the owner, no specific lien or claim can be asserted.¹¹ A mere personal claim for damages gives no right to intervene against a fund.¹² Proof of the right of the party to any part of the fund may be required by the court.¹³ Although the claim is enforceable under the rule whether it is a maritime or nonmaritime lien, nevertheless the former are given precedence over the latter¹⁶ and some cases have held that non-maritime liens cannot be enforced at all under the rule without the consent of the vessel owner.¹⁷ In a collision case when the vessel was libeled and sold, the owners were held estopped from denying the right of the representatives of the parties killed to share in the proceeds of the fund, although no lien existed, the owner having by petition enjoined such representatives from suing elsewhere, thus admitting their right to sue.¹⁸ The above Admiralty rule does not authorize a summary hearing of claims against the fund, prior to the taking of proceedings for distribution by the clerk or commissioner under Admiralty Rules 57 and 58.¹⁹

[b] Priorities.

By the maritime law the creditor first filing the libel and arresting the vessel does not thereby acquire the right to have his debt paid in full to the exclusion of the other creditors whose debts are of the same rank and equal merit provided they intervene and prove their debts before or at the time of the final decree.² Where however the defendant is in default, but decree has not been entered on account of absence of the judge any

⁶The Lottawana, 21 Wall. 558, 22 L. ed. 654; Schuchardt v. Babbidge, 19 How. 239, 15 L. ed. 625; The Albert Schultz, 12 Fed. 156; The Templar, 59 Fed. 208; The Katie O'Neil, 65 Fed. 113; The Advance, 63 Fed. 706; The Elmbank, 72 Fed. 611; The E. V. Mundy, 22 Fed. 173; Petrie v. The Coal Bluff No. 2, 3 Fed. 531; The Illinois, 2 Flipp, 432, Fed. Cas. No. 7,005; The Ship Panama, Olc. 343, Fed. Cas. No. 10,703; Furness v. Magoun, Olc. 55, Fed. Cas. No. 5,163.

⁷The Guiding Star, 18 Fed. 263; The Willamette Valley, 76 Fed. 842.

⁸The Albert Schultz, 12 Fed. 156; The Edith, 94 U. S. 523, 24 L. ed. 168.

¹⁰The Lottowanna, 21 Wall. 558, 22 L. ed. 654; The Peerless, 45 Fed. 493.

¹¹Sheldrake v. The Chatfield, 52 Fed. 495; Brackett v. Hercules, Gilp. 184, Fed. Cas. No. 1,762. See also, The Balize, 52 Fed. 414.

¹²Miller v. The Peerless, 45 Fed. 491.

¹³Dent v. Radmann, 1 Fed. 882.

¹⁶The Guiding Star, 18 Fed. 267; The City of Tawas, 3 Fed. 170; The Allianca, 65 Fed. 245.

¹⁷The Lottawanna, 20 Wall. 220, 22 L. ed. 259; The Lydia A. Harvey, 84 Fed. 1001. See also, The Wyoming, 37 Fed. 544.

¹⁸Jones v. St. Nicholas, 49 Fed. 671.

¹⁹The Chief, 142 Fed. 352.

²The Arcturas, 18 Fed. 743; The Lady Boone, 21 Fed. 731; The J. W. Tucker, 20 Fed. 129.

maritime claimant who comes in afterward by petition does so subject to the libel and cannot be paid until libellant is paid in full.³ Claims of the same merit are classified according to the years in which they accrue and those of a later year are paid in preference to those of a former.⁴ A claim of an inferior class is not entitled to payment in preference to a claim of a superior class because the former happens to be in decree before the latter is filed.⁵ A claim not filed until after the report of the clerk classifying claims is made, should be postponed until after all other claims are paid. And when final order of distribution is made all claims not then in decree should be disregarded.⁶ In general, claims against the proceeds of sales in cases arising upon the lakes are usually paid in the following order; (1) costs of sale and those incident to the custody of the vessel; (2) seaman's wages unless there be subsequent salvage; (3) claim for towage and necessities furnished in a foreign port; (4) claims for supplies and materials furnished in the home port, for which a lien is given by the State law; (5) mortgages.⁷

³The Sea Lark, 34 Fed. 52.

⁴The City of Tawas, 3 Fed. 170.

⁵The City of Tawas, 3 Fed. 170.

⁶Idem; see also, The J. W. Tucker, 20 Fed. 129.

⁷The City of Tawas, 3 Fed. 170.

CHAPTER 37.

FORM AND ELECTION OF REMEDIES IN REM AND IN PERSONAM.

- § 1239. In general as to remedy in rem and in personam.
- § 1240. Materialmen may proceed in rem or in personam.
- § 1241. Choice of remedies in suits for mariner's wages.
- § 1242. —in suits for pilotage.
- § 1243. —in suits for damages by collision.
- § 1244. Right to implead other persons or vessels in collision cases.
- § 1245. Suits for assault in personam only.
- § 1246. Choice of remedies in suits for maritime hypothecation.
- § 1247. Suits on bottomry bonds generally in rem only.
- § 1248. Salvage suits in rem or in personam.

§ 1239. In general as to remedy in rem and in personam.

The admiralty rules contained in this chapter provide the form of remedy whether in personam or in rem, or both, which a party libellant may pursue in certain kinds of admiralty causes. Rule 20 contained in another chapter,¹ in effect prescribes the form of remedy in petitory and possessory suits. These various rules are largely declaratory of general principles previously settled in admiralty jurisprudence. In other cases not covered by the rules, these general principles must still be resorted to.

Author's section.

The rules from 12 to 20 contained in this chapter are "little more than a recognition and formulation of the previous practice of courts of Admiralty in this country and in England."² Since the admiralty rules have the force and effect of law,³ it follows that their enumeration of the form of remedy in the various cases set forth in this chapter, with the option of proceeding in rem or in personam or both, must operate in such cases, as a denial of any other than the enumerated remedies or of any option as to the form of remedy save where such election is given.⁴

¹Ante, § 1213.

²The *Corsair*, 145 U. S. 342, 36 L. ed. 729, 12 Sup. Ct. Rep. 949.

³Ante, § 1196. See *The J. F. Warner*, 22 Fed. 343; *The Corsair*, 145 U. S. 342, 36 L. ed. 729, 12 Sup. Ct. Rep. 949.

⁴See *The Sabine*, 101 U. S. 388, 25 L. ed. 982; *Newell v. Norton*, 3 Wall. 266, 18 L. ed. 273; *The Richard Doane*, 2 Ben. 112. Fed. Cas. No. 11,765; *The Ethel*, 66 Fed. 341. 342, 11 C. C. A. 504; *Morris v Bartlett*, 103 Fed. 677. 47 C. C. A. 578.

Actions in rem and in personam may not be joined where the admiralty rules provide for either form but not the joining of both.⁵ But in other cases not covered by the rules, the question whether libels both in rem and in personam will lie, depends upon the general principles of admiralty and upon the local rules of a particular district as sanctioned by the 46th⁷ Admiralty rule.⁸ A libel both in rem and in personam has been permitted in cases of charter parties and contracts of affreightment as to which the Supreme Court's Admiralty Rules are silent;⁹ though such joint libel will not lie if the contract of affreightment or the charter party is wholly executory because no lien exists in such a case.¹¹ It is also true that no lien exists and therefore no right to proceed in rem in cases of executory contracts of towage.¹²

§ 1240. Material men may proceed in rem or in personam.

In all suits by materialmen for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.

Twelfth Admiralty Rule, as amended May 6, 1872.

The rule was first promulgated in 1844,¹⁵ and has been twice amended. Originally it authorized a suit by material men for repairs or supplies rendered to a foreign ship or a ship in a foreign port and the procedure was either in rem or in personam. It also provided that proceeding in rem could be brought in cases of domestic ships where a lien was given by local law.¹⁶ Prior cases on the subject are in accord with the rule thus laid down and probably led to its adoption.¹⁷ The interpretation of the local laws regarding liens however caused the courts much embarrassment and the rule was amended in 1859,¹⁸ whereby proceedings in personam

⁵See *The Corsair*, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; *The Alida*, 12 Fed. 343; *The Ethel*, 66 Fed. 340, *Morris v. Bartlett*, 108 Fed. 677, 47 C. C. A. 578.

⁷Ante, § 1197.

⁸*The Zenobia*, 1 Abb. Adm. 48, Fed. Cas. No. 18,208; *Vaughan v. 630 Casks*, 7 Ben. 506; Fed. Cas. No. 16,900; *The J. F. Warner*, 22 Fed. 343; *The Hudson*, 15 Fed. 162, 176; *Heney v. Josie*, 59 Fed. 782; *The Monte A.* 12 Fed. 331. See *The Corsair*, 145 U. S. 335, 342, 36 L. ed. 726, 729, 12 Sup. Ct. Rep. 949, where it is said that joint libel in rem and in personam may perhaps lie in cases not falling within the rules.

⁹*The Monte A.* 12 Fed. 336; *The*

Director, 26 Fed. 710; *The Clatsop Chief*, 8 Fed. 164, 7 Sawy. 274; *Du-mois v. The Baracoa*, 14 Fed. 102 and cases cited. But see *The Thos. P. Sheldon*, 113 Fed. 779; *Citizens Bank v. Nantucket, etc. Co.* 2 Story, 57, Fed. Cas. No. 2,730; *The Alida*, 12 Fed. 343.

¹¹*Vandewater v. Mills*, 19 How. 91, 15 L. ed. 557.

¹²*The Monte A.* 12 Fed. 331. See *Jacoby v. The Eugene*, 83 Fed. 222; also *The Director*, 26 Fed. 708.

¹⁵See How. 3.

¹⁶See *The Madrid*, 40 Fed. 677.

¹⁷*The General Smith*, 4 Wheat. 443, 4 L. ed. 609; *Peyroux v. Howard*, 7 Pet. 324, 8 L. ed. 701.

¹⁸See *Maguire v. Card*, 21 How.

instead of in rem were allowed in all cases under the rule against domestic ships. A second amendment was made in 1872 and as the rule now stands the material men have in all cases their option to proceed either in rem or in personam.¹⁹ So where a lien exists no matter by what law, the rule removes all obstacles to a proceeding in rem.²⁰ And where no lien exists, suit may be brought in personam.¹ A libel in rem based on a State's statute and commenced prior to the amendment of 1859 was held maintainable.² The remedy of the material men is always threefold; against the ship and freight in rem, or against the master or against the owner in personam.³

§ 1241. Choice of remedies in suits for mariner's wages.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone in personam.

Thirteenth Admiralty Rule, promulgated December term, 1844.

The claims for mariners wages have priority over all others,⁶ and the lien attaches to the ship and freight, and follows them wherever they go.⁷ Seamen have triple security, however under the rule, in the vessel, the owner, and the master.⁸ The owner is liable personally though his name is not mentioned in the shipping articles;⁹ and even though he let the ship to the master, unless the seaman had knowledge of that fact at the time.¹⁰ But a vessel and her owner cannot be joined in the same libel under the rule,¹¹ since it is well settled that a suit in rem and in personam cannot be joined in any of the cases covered by the rules, unless specially permitted.¹²

§ 1242. — in suits for pilotage.

In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the and master, or against the ship, or against the owner alone or the

Fourteenth Admiralty Rule, promulgated December term, 1844.

Lawrence, 1 Black, 522, 17 L. ed. 180. In the Lottawanna, 21 Wall. 559, 22 L. ed. 654, the several amendments are set forth.

¹⁹See The Lottawanna, 21 Wall. 558, 22 L. ed. 654.

²⁰The Lottawanna, 21 Wall. 558 22 L. ed. 654.

¹Schultz v. Bosman, 5 Hughes, 101, Fed. Cas. No. 12,488.

²The Steamer St. Lawrence. 1 Black, 522, 17 L. ed. 180.

³North v. Brig Eagle, Bee. 78, Fed. Cas. No. 10,309; The Chusan, 2 Story, 455, Fed. Cas. No. 2,717; The

Marion, 1 Story, 68, Fed. Cas. No. 9,087.

⁶Brown v. Lull, 2 Sumn. 443, Fed. Cas. No. 2,018.

⁷Brown v. Lull, 2 Sumn. 443, Fed. Cas. No. 2,018.

⁸Bronde v. Haven, Gilp. 592, Fed. Cas. No. 1,924.

⁹Id.

¹⁰Skosfield v. Potter, Dav. 392, Fed. Cas. No. 12,925.

¹¹The Ethel, 66 Fed. 340, 13 C. C. A. 504.

¹²The Corsair, 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949. See ante, § 1239, note.

The rule indicates clearly that the libelant is entitled to proceed either in rem or in personam at his election.¹⁵

§ 1243. — in suits for damages by collision.

In all suits for damage by collision, the libelant may proceed against the ship and master, or against the ship alone, or against the master or owner alone in personam.

Fifteenth Admiralty Rule, promulgated December term, 1844.

The rule permits libel in rem against the vessel and in personam against the master,¹⁷ though the master may be owner as well; but it does not permit such joint suits against vessel and an owner who is not also master.¹⁸ But libelant may proceed successively in each way till the demand is satisfied.¹⁹ However under the 59th rule²⁰ the owner of a vessel libeled for collision may by process in personam bring in other parties without infringing this rule.¹ The rule by implication prohibits only the joinder, in a collision cause, of the vessel and her owners, so other parties not owners and alleged to be liable for the same collision may be joined with the vessel as co-defendants.²

§ 1244. Right to implead other persons or vessels in collision cases.

Under the 59th admiralty rule, promulgated in 1883, it is now competent for a respondent in libel in personam for collision, or for claimant in libel in rem to have other parties or vessels brought in by petition.⁴

Author's section.

§ 1245. Suits for assault in personam only.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

Sixteenth Admiralty Rule, promulgated, December term, 1844.

The jurisdiction of admiralty in cases of tort has been discussed in an early chapter.⁶ Some torts give rise to a maritime lien, and as in the case

¹⁵The William Law, 14 Fed. 796.

¹⁷Ward v. Ogdensburg, 1 Newb. 139, Fed. Cas. No. 17,158.

¹⁸Newell v. Norton, 3 Wall. 266, 18 L. ed. 271, as explained in The Corsair, 145 U. S. 342, 36 L. ed. 729, 12 Sup. Ct. Rep. 950; The Clatsop Chief, 8 Fed. 165, 7 Sawy. 274; S. S. Zodiac, 5 Fed. 220; Richard

Doane, 2 Ben. 112, Fed. Cas. No. 11,765.

¹⁹Ward v. Ogdensburg, 5 McLean, 622. Fed. Cas. No. 17,158.

²⁰Post, § 1273.

¹Joice v. Canal Boats, 32 Fed. 553, see The Hudson, 15 Fed. 172.

²Joice v. Canal Boats, 32 Fed. 553.

⁴See post, § 1273.

⁶Ante, § 2.^[kk]

of other liens the remedy of the injured party may be in rem.⁷ But if there is no lien libel in rem will not lie.⁸ This rule, as well the general principles of admiralty law, forbid proceedings in rem in cases of assault. Libel may be brought, under this rule against an officer for an assault on a seaman,⁹ or on a passenger.¹⁰ And the master may be held for such assault if done under his authority or knowledge.¹¹ But in no case can a suit for assault be maintained in rem.¹²

§ 1246. Choice of remedies in suits for maritime hypothecation.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

Seventeenth Admiralty Rule promulgated December Term, 1844.

§ 1247. Suits on bottomry bonds generally in rem only.

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrong-doer.

Eighteenth Admiralty Rule, promulgated December Term, 1844.

§ 1248. Salvage suits in rem or in personam.

In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.

Nineteenth Admiralty Rule, promulgated December term, 1844.

⁷The Rock Island Bridge, 6 Wall. U. S. 343, 36 L. ed. 727, 12 Sup. Ct. 215, 18 L. ed. 753. See *The Panama*, 101 U. S. 462, 25 L. ed. 1061.

⁸*The New World v. King*, 16 How. 472-477, 14 L. ed. 1019; *The A. Heat-ton*, 43 Fed. 595; *The Anaces*, 93 Fed. 242; *The Marion Chilcott*, 95 Fed. 689; *The City of Brussels*, 6 Ben. 371, Fed. Cas. No. 2,745; *The Corsair*, 145

⁹*Forbes v. Parsons, Crabbe*, 283, Fed. Cas. No. 4,929; *Roberts v. Dallas, Bee*, 239, Fed. Cas. No. 11,898.

¹⁰*Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2,575.

¹¹*Hanson v. Fowle*, 1 Sawy. 539, Fed. Cas. No. 6,042.

¹²*The Lyman D. Foster*, 85 Fed. 987.

It is settled that this rule does not permit a joinder of libel in rem with one in personam;¹⁵ though it does not prohibit a party from pursuing the two remedies severally.¹⁶ The usual course of voluntary salvors is to proceed in rem; and of hired salvors in personam.¹⁷ Not only is the legal owner, liable in personam under this rule, but also another having a direct pecuniary interest in the property e. g. the United States when in possession through its revenue officers.¹⁸

¹⁵*Bondies v. Sherwood*, 22 How. Fed. 280; *Providence Ins. Co. v. Wa-*
217, 16 L. ed. 238; *The Sabine*, 101 ger, 35 Fed. 364.

U. S. 384, 25 L. ed. 982; *Nott v.* ¹⁷*The Sabine*, 101 U. S. 384, 25 L.
The Sabine, 2 Woods, 212, Fed. Cas. ed. 982.
No. 10,366; *The Zodiac*, 5 Fed. 223.

¹⁶*Brevoor v. The Fair American*, 1 ¹⁸*United States v. Cornell*, 202 U.
S. 184, 50 L. ed. 987, 26 Sup. Ct.
Pet. Adm. 87, Fed. Cas. No. 1,847; Rep. 648.
Atlantic Ins. Co. v. Alexandre, 16

CHAPTER 38.

CLAIM, ANSWER, INTERVENTION, DISMISSAL AND CROSS LIBEL IN ADMIRALTY.

- § 1258. Form and verification of claim in suits in rem.
- § 1259. Answer to be on oath, full and explicit.
- § 1260. —except where less than \$50 in dispute.
- § 1261. Exceptions to answer.
- § 1262. How further answer compelled where exception allowed.
- § 1263. What allegations or interrogatories need not be answered.
- § 1264. Exceptions for irrelevancy, scandal, etc.
- § 1265. Interrogatories in answer—effect of libelants failure to respond.
- § 1266. Result where absence or disability prevents answer to interrogatories.
- § 1267. New matter in answer deemed traversed without replication—libelant may amend.
- § 1268. Intervenors—other parties may be required to answer.
- § 1269. Default and setting aside before final decree.
- § 1270. Default decree may be rescinded and rehearing granted.
- § 1271. Dismissal for non-appearance of libelant.
- § 1272. Cross libel.
- § 1273. Right of claimant or respondent in collision case to implead new parties or vessels.

§ 1258. Form and verification of claim in suits in rem.

In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner.

Part of Twenty-sixth Admiralty Rule, promulgated December term, 1844.

The remainder of the rule requires of claimant a stipulation for costs and is given elsewhere.¹ A claimant under the above rule is one who as-

¹Ante, § 1228.

sumes the position of a defendant and demands the redelivery of the vessel to him.² Such claimant must put his claim upon oath positively averring his proprietary interest therein and a refusal to do so is sufficient reason for rejecting it.³ So also when the claim is made by an agent he must make oath that he is duly authorized.⁴ When the claimant has failed to show any right to the property, on delivery to him he cannot avoid his stipulation by pleading such failure.⁵ Following the rules of the southern district of New York, verification of the amended libel has been held unnecessary in the northern district of California, when the res has been released on stipulation and libelants are out of the jurisdiction.⁷

§ 1259. Answer to be on oath, full and explicit.

In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

Twenty-seventh Admiralty Rule, promulgated December Term, 1844.

The answer must be on oath⁹ of the defendant himself and not another for him.¹⁰ The libelant is entitled to a distinct admission or denial of the allegations in the libel,¹¹ and a general denial has been held insufficient.¹² But the failure to notice an allegation does not admit it.¹³ A general averment in the answer in an action for salvage that other parties were insurers, is insufficient, in the absence of an averment that their names were unknown.¹⁴ But a statement that the respondent was "ignorant" of a matter in the libel is not a sufficient answer.¹⁵ A denial of an anticipatory averment in the libel is held equivalent to an averment to the contrary.¹⁶ A plea to the jurisdiction may be embraced in an answer to the merits.¹⁷

²The Two Marys, 12 Fed. 152.

³United States v. Four Hundred, etc. Casks of Wine, 1 Pet. 549, 7 L. ed. 257. See also, Steamer Spark v. Lee Choi Chum, 1 Sawy. 718, Fed. Cas. No. 13,206.

⁴United States v. Four Hundred, etc. Casks of Wine, 1 Pet. 549, 7 L. ed. 257; The R. W. Skillinger, 1 Flipp. 437, Fed. Cas. No. 12,181; United States v. Twenty-five Barrels of Alcohol, 10 Int. Rev. Rec. 17 Fed. Cas. No. 16,562. See also The Two Marys, 12 Fed. 152.

⁵Todd v. Bark Tulchen, 2 Fed. 604.

⁷Tibbol v. Marion, 79 Fed. 104.

⁹Gammell v. Skinner, 2 Gall. 45, Fed. Cas. No. 5,210.

¹⁰Teasdale v. The Rambler, Bee Adm. 9, Fed. Cas. No. 13,815.

¹¹The Dictator, 30 Fed. 699; Todd v. Bark Tulchin, 2 Fed. 605.

¹²Virginia Home Ins. Co. v. Sundberg, 54 Fed. 389.

¹³The Dictator, 30 Fed. 699.

¹⁴Morgan, etc. S. S. Co. v. De Arrotegui, 25 Fed. 624.

¹⁵The City of Salem, 10 Fed. 843, 17 Sawy. 477.

¹⁶Burrill v. Crossman, 69 Fed. 747, 16 C. C. A. 381.

¹⁷Inman v. Lindrup, 70 Fed. 718.

Answers to interrogatories as provided for under the rule are designed as compulsory amplifications of the pleadings on the specific subjects contained in the interrogatories, the object being to dispense with the taking of proof or evidence proper on the facts which may be admitted.¹⁸ They are not considered a 'deposition' for which costs can be taxed under R. S. § 824.¹⁹

§ 1260. — except where less than \$50 in dispute.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court. All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

Forty-eighth Admiralty Rule promulgated December term, 1850.¹

§ 1261. Exceptions to answer.

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

Twenty-eighth Admiralty Rule, promulgated December term, 1844.

§ 1262. How further answer compelled where exception allowed.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

Thirtieth Admiralty Rule.

¹⁸The *Serapis*, 37 Fed. 442.

¹⁹The *Serapis*, 37 Fed. 442.

¹See 10 How. vi.

When the answer is insufficient the court under the above rule may render a decree against the owners claimants and stipulators.⁴

§ 1263. What allegations or interrogatories need not be answered.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offense.

Thirty-first Admiralty Rule.

The defendant is not bound in his answer to make any statement which will subject him to a forfeiture for a penal offense.⁵

§ 1264. Exceptions for irrelevancy, scandal, etc.

Exceptions may be taken to any . . . allegation, or answer, for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose . . . answer the same is found.

Thirty-sixth Admiralty Rule, promulgated December term, 1844.

The rule also includes exception to a libel.⁶ An exception to an allegation that it serves no legal purpose, is properly excepted to for impertinence.⁷

§ 1265. Interrogatories in answer—effect of libelants failure to respond.

The defendant shall have a right to require the personal answer of the libelant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libelant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libelant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libelant to such interrogatories, the court may adjudge the libelant to be in default, and dismiss the libel, or may compel his answer in the premises, by at-

⁴Todd v. Bark Tulchen. 2 Fed. 16,561; Pollock v. The Laura. 5 Fed. 406. 133.

⁵United States v. Twenty-eight ⁸Ante, § 1200.

Packages, Gilp. 306. Fed. Cas. No. ⁹The Pioneer, Deady 58, Fed. Cas. No. 11,176.

tachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

Thirty-second Admiralty Rule, promulgated December term, 1844.

Interrogatories annexed to the answer are derived from the practice of the civil law and are designed to supersede the necessity of proof and to bring out distinctly before the court the point on which the defense or claim is intended to be rested.¹¹ So where the libel is evasive and tends to hide the real point in litigation the defendants only relief would seem to be by interrogatories under the rule.¹² Where an answer to a libel to recover for goods lost, propounded interrogatories regarding the amount of goods loaded in the vessel their value etc., the libelant should be compelled to answer under the rule.¹³ Where, however, an answer to an interrogatory is refused the charge to which it relates may be taken pro confesso.¹⁵ Or the defendant may be compelled to answer the interrogatories.¹⁶

§ 1266. Result where absence or disability prevents answer to interrogatories.

Where either the libelant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in the furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

Thirty-third Admiralty Rule, promulgated December term, 1844.

§ 1267. New matter in answer deemed traversed without replication—libelant may amend.

When the defendant, in his answer, alleges new facts these shall be considered as denied by the libelant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libelant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in

¹¹The Mexican Prince, 70 Fed. 248; Gammell v. Skinner, 2 Gall. 45, Fed. Cas. No. 5,210. See also, Havermeyers, etc. Co. v. Compania, 43 Fed. 90.

¹²The Mexican Prince, 70 Fed. 248.

¹³The Oregon, 116 Fed. 482, 53 C. C. A. 650.

¹⁵The David Pratt, 1 Ware, 509. Fed. Cas. No. 3,597.

¹⁶Gammell v. Skinner, 2 Gall. 45, Fed. Cas. No. 5,210.

the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

Fifty-first Admiralty Rule, as amended January 27, 1896.¹⁷

The original rule was promulgated December term, 1854,¹⁸ and as it stood originally it would seem that the defendant on putting in issue new facts in his answer cannot object to evidence offered by the libellant in rebuttal although no amendment had been made to the libel, setting forth the new matter.¹⁹ No replication in admiralty is now necessary to put the case in issue.²⁰ And new facts set up in answer are taken as denied as of course.²¹

§ 1268. Intervenor—other parties may be required to answer.

If any third person shall^a intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interests therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain.

Part of thirty-fourth Admiralty Rule promulgated December Term, 1844.

The remainder of the rule requiring the giving of a stipulation is found elsewhere.¹ An intervenor under the rule is one who merely seeks protection of his interest or payment of his claim in the ultimate disposition of the case, and not the possession of the res.² And the rule applies only to those cases in which the res is still in custody or has been sold and the proceeds paid into court.³ So where the vessel has been released on stipulation interveners cannot come in.⁴ A person claiming an interest however may intervene and contest forfeiture so far as the decree would be conclusive of his rights,⁵ even though his original demand could not have been proceeded for in admiralty.⁶

¹⁷See 160 U. S. 693.

¹⁸See 17 How. vi.

¹⁹See *Moore v. The Robilant*, 42 Fed. 162.

²⁰*The Hingston*, 144 Fed. 562.

²¹*The Hingston*, 144 Fed. 562; *The Celtic Monarch*, 138 Fed. 711, (C. C. A.)

¹*Ante*, § 1227.

²*The Two Marys*, 12 Fed. 152.

³*The Oregon*, 158 U. S. 186, 39 L. ed. 943, 15 Sup. Ct. Rep. 804.

⁴*The Oregon*, 158 U. S. 205, 39 L. ed. 943, 15 Sup. Ct. Rep. 804. See also, *Hawgood, etc. Transit Co. v. Dingman*, 94 Fed. 1011, 36 C. C. A. 627.

⁵*The Mary Anne*, 1 Ware, 99, Fed. Cas. No. 9,195.

⁶*Harper v. New Brig, Gilp*, 536, Fed. Cas. No. 6,090.

§ 1269. Default and setting aside before final decree.

If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken up pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

Twenty-ninth Admiralty Rule, promulgated December term, 1884.

The effect of default in admiralty seems to be the same as in actions at law. It is a virtual confession.⁹ Thus default has been held to establish the truth of averments that there had been an executive seizure of property.¹⁰ So too it has been held an admission of a lien of the libellants.¹¹ Just what proof should be required after default has been made rests with the discretion of the court,¹² and depends upon the circumstances of the case.¹³ The allegations of the libel must of course be sufficient at law.¹⁴ Decree pro confesso is not final and merely authorizes the court to hear the cause ex parte, either directly or by reference, to a commissioner to ascertain the amount due.¹⁵ Moreover it is not entered as of course in conformity with the prayer of the libel, but the court should make only such decree as to it seems proper, taking the averments of the libel as true.¹⁶ In the case of several defendants a decree pro confesso rendered against one of them does not affect the rights of others and they may appear and contest the very point admitted by the absent party.¹⁷

§ 1270. Default decree may be rescinded and rehearing granted.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been en-

⁹Miller v. United States 11 Wall. 301, 20 L. ed. 135; Rostron v. Water Witch, 44 Fed. 95; Briggs v. Taylor, 84 Fed. 683, 28 C. C. A. 518.

¹⁰The Confiscation Cases, 20 Wall. 108, 22 L. ed. 322.

¹¹Rostron v. The Water Witch, 44 Fed. 96.

¹²United States v. The Mollie, 2 678.

Woods, 319, Fed. Cas. No. 15,795.

¹³United States v. The Lion, 1 Sprague, 399, Fed. Cas. No. 15,607.

¹⁴United States v. The Lion, 1 Sprague, 399, Fed. Cas. No. 15,607.

¹⁵The Lopez, 43 Fed. 95.

¹⁶Cape, etc. Co. v. Pearsall, 90 Fed. 438, 33 C. C. A. 161.

¹⁷The Mary, 9 Cranch, 143, 3 L. ed.

tered, the defendant submitting to such further orders and terms in the premises as the court may direct.

Fortieth Admiralty Rule, promulgated December term, 1844.

Costs will usually be imposed as a condition of opening a decree.¹

§ 1271. Dismissal for non-appearance of libelant.

If, in any admiralty suit, the libelant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

Thirty-ninth Admiralty Rule, promulgated December term, 1844.

§ 1272. Cross libel.

The 53rd admiralty rule⁴ requires the giving of stipulation for costs by the respondent on the cross libel, but the Supreme Court has not otherwise provided the practice respecting cross libels. They correspond generally to the cross bill of courts of equity, are permissible where the claim set up grows out of the same fact or transaction as is involved in the original libel, and necessary to the granting of an affirmative decree.

Author's section.

The cross libel of admiralty is similar to the cross bill in equity.⁵ The claim on which the cross libel is founded must arise out of the same cause of action as the libel itself;⁶ but not necessarily the same legal demand.⁷ The rule has been held broad enough to allow all matters in dispute which must necessarily be considered in the determination of the original cause, to be passed upon by the court and the rights of both parties thus to be settled in one suit.⁸ There exists in admiralty as at common law, a right of recoupment which permits a respondent to set off damages or loss without the necessity for filing a cross libel.¹⁰ But an affirmative decree

¹Jepson v. The American, 56 Fed 1021.

⁴Ante, § 1226.

⁵Bowker v. United States, 186 U. S. 140, 46 L. ed. 1092, 22 Sup. Ct. Rep. 802. See ante, § 963.

⁶The C. B. Sanford, 22 Fed. 863; see also, The Ping-On v. Blethen, 11 Fed. 612, 7 Sawy. 482; The Frank Gilmore, 73 Fed. 686.

⁷Crowell v. Schooner Theresa Wolf, 4 Fed. 152.

⁸Vianello v. Credit, Lyonnais, 15 Fed. 637.

¹⁰Ebert v. The Doud, 3 Fed. 520, 9 Biss. 458; Gillingham v. Charles-ton Co. 40 Fed. 650; The Sapphire, 18 Wall. 51, 21 L. ed. 814; The Tom Lysle, 48 Fed. 692.

in respondent's favor in excess of what may be adjudged to libellant, can never be entered without a cross libel.¹¹

A cross libel is not maintainable which sets up the breach of a former separate contract because it does not arise out of the same cause of action within the meaning of the rule.¹² So in a suit to recover damages for collision a cross libel to recover damages for a different collision is improper.¹³ Nor can a cross libel be sustained for salvage on account of services rendered to the injured vessel in a suit for damages caused by a collision.¹⁴ The proceeding on the cross libel is against the plaintiff or other defendants or both, but none other than the parties to the original libel can be joined.¹⁵ The original and the cross libel may be tried together or separately¹⁶ but admissal of the latter does not affect the respondent's rights in the former and every defense is still open to him.¹⁷

§ 1273. Right of claimant or respondent in collision case to implead new parties or vessels.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain.

Part of 59th Admiralty Rule, promulgated March 26, 1883.¹

The remainder of the 59th rule provides for the stipulation in such a proceeding.² Prior to the adoption of this rule, the district court for the

¹¹The Dove, 91 U. S. 384, 23 L. ed. 354. See also The Tom Lysle, 48 Fed. 691; Ebert v. Schooner, 3 Fed. 534; Gillingham v. Charleston, etc. Transportation Co. 40 Fed. 651; Bowker v. United States, 186 U. S. 141, 46 L. ed. 1092, 22 Sup. Ct. Rep. 802.

¹²The Zuave, 29 Fed. 296.

¹³The Frank Gilmore, 73 Fed. 686.

¹⁴Crowell v. Schooner Theresa Wolf, 4 Fed. 152.

¹⁵Ping On v. Blethen, 17 Fed. 607, 7 Sawy. 482; The Dove, 91 U. S. 385, 23 L. ed. 354.

¹⁶The Dove, 91 U. S. 385, 23 L. ed. 354.

¹⁷The Dove, 91 U. S. 385, 23 L. ed. 354.

¹¹²U. S. 743.

²Ante, § 1229.

southern district of New York had required parties in a case before it to follow the practice which it outlines, declaring it best adapted to the ends of justice.³ The petitioner should answer the libel, the libelant should answer the petition; and the new party should answer both libel and petition.⁴ The rule permits the claimant to a vessel libeled to implead in personam, either the owners of other vessels alleged to be in fault,⁵ or a third person such as a wharfinger whose neglect is alleged to have caused the collision.⁶ So the owner may have the charterers impleaded.⁷ Where several libelants having distinct damage interest, recover in a cause of collision, the decree may be in form for recovery by all of the aggregate sum and directing a distribution to each of the sums respectively adjudicated to them.⁸ Where the owner of a vessel libeled in a collision case causes another party to be made codefendant under this rule, a decree may be rendered against the vessel, and the case may be continued as between the two defendants.⁹

³See *The Hudson*, 15 Fed. 162, decided Feb. 7, 1883. stable, 181 U. S. 467, 45 L. ed. 957. 21 Sup. Ct. Rep. 684; *The Venus*, 113

⁴*The Greenville*, 58 Fed. 805. Fed. 387.

⁵*The Doris Eckhoff*, 32 Fed. 556.

⁸*The City of Alexandria*, 44 Fed.

⁶*Joice v. Canal Boats*, 32 Fed. 553.

361.

⁷*The Alert*, 40 Fed. 836; *The Barn-*

⁹*Ceballos v. The Alert*, 44 Fed. 685.

CHAPTER 39.

TRIAL, PROOF AND REFERENCES. DECREE AND ENFORCEMENT.

- § 1281. Mode of proof.
- § 1282. References to commissioners and their powers.
- § 1283. Trial of issues of fact before jury in certain cases.
- § 1284. The decree.
- § 1285. Enforcement of decrees.
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- § 1287. Sale of property and proceeds.
- § 1288. Correction and vacation of decree and further proof prior to decree.
- § 1289. Final record to contain what.

§ 1281. Mode of proof.

The mode of proof in causes . . . of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein especially provided.

R. S. § 862, U. S. Comp. Stat. 1901, p. 661.

The above provision also applies to equity procedure¹ and was originally enacted August 23, 1842.² The clause "except as herein especially provided" refers to chapter 17 of title XIII. of the Revised Statutes, which deals with "Evidence" and provides for the taking and use of depositions under certain circumstances.³ The power of Congress to authorize the courts to regulate the equity and admiralty practice by rules is well settled.⁴ Depositions *de bene esse* pursuant to R. S. § 863,⁵ are sometimes taken in admiralty.⁶ Depositions under a *dedimus potestatem*, as provided in R. S. § 866,⁷ are also used. But where the witnesses are within the jurisdiction of the court and can conveniently attend, it is of course usual to have their testimony taken orally either before the court, or before a commissioner to whom the court may, under rule 44,⁸ have referred the issues involved.

¹See ante, § 1036.

²Act Aug. 23, 1842, c. 188, § 6, 5 Stat. 518.

³See post, §§ 1761 et seq.

⁴*White v. Toledo, etc. R. R.* 79 Fed. 133. 24 C. C. A. 467. See ante, § 1036, note .

⁵See post, § 1761.

⁶*The Samuel* 1 Wheat. 9, 4 L. ed. 23; *The Argo*, 2 Wheat. 287, 4 L. ed. 241; *The Experiment*, 4 Wheat. 84, 4 L. ed. 520.

⁷Post, § 1765.

⁸Post, § 1282.

The Supreme Court has but meagerly exercised the power of prescribing modes of proof conferred by the above section of the Revised Statutes. In consequence the practitioner must look to the rules of a particular district to ascertain the local practice. In some districts an order referring the issues to a standing commissioner of the court is made as matter of course when the answer is in. In others the practice of hearing proof orally in court is followed, though matters of account or computation of damages would probably never be so heard. July trials are allowed by Congress in certain cases if demanded by either party, but are probably not common even in such cases.⁹ Parties are not entitled to recover on a theory outside of or repugnant to the scope of the libel.¹⁰

§ 1282. References to commissioners and their powers.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein.^{[a]-[b]} And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

Forty-fourth Admiralty Rule, promulgated December 4, 1844.

[a] In general.

In cases of further proof on appeal the Supreme Court has provided in its 12th rule for reference to commissioners.¹² In some districts all causes are referred as of course, as soon as issue is joined. The rule vests a large discretion in the district court,¹³ and the order of reference need not assign the reasons therefor.¹⁴ When there is a dispute as to accounts, priority of liens and like matters, reference to a commissioner is usual and proper.¹⁵ Computation of damages may also be referred to them.¹⁶ An award of damages is not invalidated by the fact that the commissioner sat outside of the territorial jurisdiction of the court.¹⁷

[b] Proceedings on reference.

The mode of proceeding before commissioners is not prescribed by the

⁹Post, § 1283.

¹⁰Barber v. Lockwood, 134 Fed. 985.

¹²Post, §§ 2087-2089.

¹³See Lee v. Thompson, 3 Wood, 167, Fed. Cas. No. 8,202.

¹⁴The Wavelet, 25 Fed. 733.

¹⁵Shaw v. Collier, 4 Blatchf. 370, 18 How. Pr. 238.

Fed. Cas. No. 12,718; Furniss v. Brig Magoun, Olcott, 55, Fed. Cas. No. 5,163.

¹⁶See The State of California, 4 C. A. 393, 54 Fed. 404; The Shand, 4 Fed. 925.

¹⁷The William H. Bailey, 111 Fed. 1006, 50 C. C. A. 76.

rules, except in so far as the analogy of references in equity is suggested and perhaps intended to be followed.¹ The practitioner should advise himself as to the rules governing the local practice in any given district. Usually references are to the standing commissioners, though the parties may agree upon some other. Due notice of the time set for the presentation of testimony should be given. The parties should present their proofs in the usual orderly manner, the libellant first putting in his entire case in chief and the respondent or claimant putting in his defense.² However, evidence may be admitted out of the usual order where good cause is shown for the failure to present it in due course.³ In some districts it is customary to refer any disputed question of the admissibility of evidence to the court for decision at the time it arises.⁴ When the evidence is completed the commissioner should report his findings to the court. The findings on questions of fact, are entitled to the same weight as those of a master in chancery⁵ and they should not be disturbed by the court, especially if the evidence is conflicting,⁷ unless a mistake or error is clearly apparent.⁸ As regards form, the findings should be made in distinct paragraphs, if practicable, and numbered successively.⁹ A party aggrieved by the findings has a right of exception similar to that available in equity. Alleged errors will not be noticed unless clearly excepted to;¹¹ and only the grounds on which objection was made to the admission of evidence before the commissioner will be considered by the court in passing on the correctness of the ruling admitting the testimony.¹² But exceptions to the commissioner's report will not suffice on appeal, to raise alleged errors in the decree;¹³ though if further proof is ordered in the appellate court want of exception below will not prevent objection to the damages there allowed.¹⁴ It is proper practice for the proctor in excepting to the commissioner's report to refer to the number of the paragraph of the finding excepted to.¹⁵ When necessary the court may authorize the employment of a stenographer and decree that his fees shall be taxed as costs.¹⁶

§ 1283. Trial of issues of fact before jury in certain cases.

In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce

¹See ante, § 1067, et seq.

²The Guy C. Goss, 53 Fed. 826.

³The Guy C. Goss, 53 Fed. 826, 828.

⁴See The Shand, 4 Fed. 925.

⁵The Elton, 31 C. C. A. 496, 83 Fed. 519; Panama R. Co. v. Napier Ship Co. 61 Fed. 408, 9 C. C. A. 553;

⁷The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

⁸Panama R. Co. v. Napier Shipping Co. 61 Fed. 408, 9 C. C. A. 553;

La Bourgogne, 144 Fed. 781, — C. C. A. —.

⁹The Itasca, 117 Fed. 885.

¹¹The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

¹²See The Bulgaria, 83 Fed. 312.

¹³Sun Mut. Ins. Co. v. Mississippi, etc. Co. 16 Fed. 800, 5 McCrary, 265.

¹⁴Ross v. Southern C. O. Co. 41 Fed. 152.

¹⁵The Itasca, 117 Fed. 885.

¹⁶Rogers v. Brown, 136 Fed. 813.

and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it.

Part of R. S. § 566, U. S. Comp. Stat. 1901, p. 461.

[a] History of provision and related statutes.

The first part of the above section provides generally for jury trials of issues of fact except in equity and admiralty, and is given in a preceding chapter.¹ There was a provision in a statute of 1875 which required the circuit court in admiralty cases to find the facts and conclusions of law separately, and which further declared that "in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law."² While never expressly repealed, it seems clear that this provision was rendered altogether inoperative by the clause of the circuit court of appeals act of 1891, which took away all the circuit court's appellate jurisdiction and made the circuit court of appeals' judgments final in admiralty causes.³

R. S. 566 is from an act of 1845 which declared that the admiralty jurisdiction should extend to the Great Lakes and connecting waters. At that time the Supreme Court was supposed to be committed to the rule that the jurisdiction must be restricted to waters in which the tide ebbed and flowed. The repudiation of that doctrine later, made it unnecessary to carry forward into the Revised Statutes any other portion of the original provision of 1845 than that contained in R. S. § 566, supra;⁴ and some question has been made as to the propriety of preserving even this part of the act of 1845, since Congress in providing for jury trials in cases on the great lakes believed that it was merely preserving an existing right derived under the common law and not creating a new right in admiralty.⁵ There is no constitutional right to a jury in admiralty causes,⁶ though it is not unusual to call in nautical assessors whose conclusions on questions of fact are highly persuasive upon the court.⁷

¹Ante, § 911.

²Act Feb. 16, 1875, c. 77, § 1, 18 Stat. 315, U. S. Comp. Stat. 1901, p. 525.

³See ante, § 77.

⁴See *The Eagle*, 8 Wall. 15, 19 L. ed. 365.

⁵*The City of Toledo*, 73 Fed. 225; *Gillett v. Pierce*, 1 Brown, Adm. 553, Fed. Cas. No. 5,437.

⁶*United States v. La Vengeance*, 3 Dall. 301, 1 L. ed. 610; *United States*

v. Sally, 2 Cranch 406, 2 L. ed. 320; *United States v. The Betsey*, 4 Cranch. 452, 2 L. ed. 673; *Whelan v. United States*, 7 Cranch, 112, 3 L. ed. 286; *In re Ross*, 140 U. S. 464, 35 L. ed. 581, 1 Sup. Ct. Rep. 897.

⁷See *The City of Washington*, 92 U. S. 31, 23 L. ed. 600; *The Hypodame*, 6 Wall. 216, 18 L. ed. 794; *The Emily*, 1 Olcott, 132, Fed. Cas. No. 4,453; *The Rival*, 1 Spr. 128, Fed.

[b] Scope and effect.

The courts have declined to hold that the above provision giving a right to jury trial, means the common law jury, whose verdict is conclusive upon the court. It is settled that the verdict of a jury under this section is merely advisory, as in courts of equity;⁸ and the judge is still responsible for the decree.⁹ Moreover it must always appear that the case falls plainly within the terms of the section.¹⁰ It is necessary that the cause arise upon the great lakes or connecting waters.¹¹ The Monongahela and Ohio rivers are not "navigable waters connecting lakes" within the meaning of the section;¹² but artificial communications, such as canals, may be.¹³ Where two vessels are concerned in the suit it is not necessary for both of them to be of twenty tons burden in order to bring the case within the section.¹⁴ If, however, both vessels are foreign or engaged in foreign trade or in trade between parts of the same State the section will probably not apply.¹⁵ Prize cases are excluded,¹⁶ and apparently cases of salvage jettison and general average also.¹⁷ Neither does the section apply in cases of vessels engaged in the domestic commerce of a State.¹⁸

§ 1284. The decree.

The admiralty rules do not provide specifically regarding the form and entry of decrees, though there is a minor provision regarding decree in collision cases.¹ In general, however, the practice respecting admiralty decrees is similar to that in equity. After a cause has been heard and submitted, the decree is pronounced by the court according to the law and facts. Such decree may be interlocutory or final. Where a party is in default a decree pro confesso may be rendered.²[a]-[d]

Author's section.

[a] Form and scope.

The decree may award any relief which the law applicable to the case

Cas. No. 11,867; *The Empire*, 19 Fed. 559.

⁸*The Eagle*, 8 Wall. 15, 19 L. ed. 365; *The City of Toledo*, 73 Fed. 220; *Lee v. Thompson*, 3 Woods, 167, Fed. Cas. No. 8,202; *Boyd v. Clark*, 13 Fed. 908; *The Empire*, 19 Fed. 559. See also *Dunphy v. Kleinsmith*, 11 Wall. 610, 20 L. ed. 223.

⁹*The City of Toledo*, 73 Fed. 220.

¹⁰*Gillett v. Pierce*, 1 Brown, Adm. 553, Fed. Cas. No. 5,437.

¹¹*Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *Franconet v. The Backus*, 1 Newb. Adm. 1, Fed. Cas. No. 5,048.

¹²*Bigley v. The Venture*, 21 Fed. 880.

¹³*Scott v. The Young America*, 1 Newb. Adm. 101, Fed. Cas. No. 12,549.

¹⁴*The Erie Belle*, 20 Fed. 63.

¹⁵*The Erie Belle*, 20 Fed. 64.

¹⁶*The Eagle*, 8 Wall. 23, 19 L. ed. 365.

¹⁷See *The Eagle*, 8 Wall. 23, 19 L. ed. 365.

¹⁸*The Genesee Chief*, 12 How. 443, 13 L. ed. 1058; *Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *Jones v. The Coal Barges*, 3 Wall. Jr. 53, Fed. Cas. No. 7,458. See also *Allen v. Newberry*, 21 How. 244, 16 L. ed. 110; *The Erie Belle*, 20 Fed. 63.

¹⁹§ 1272.

²⁰See ante, § 1269.

warrants, though there be inaccurate statement of subordinate facts, provided the libellant propounds distinctly the substantial facts on which he relies and prays generally or specifically for appropriate relief.⁴ In proceedings to carry the decree into effect, original proceedings are before the court when necessary to determine new points in the controversy.⁵

[b] Personal judgment.

The general rule is that personal judgment cannot be entered against the claimants in an action in rem, unless they have signed the stipulation given in lieu of the vessel seized;⁷ or unless there has been an amendment and the issue of new process in personam,⁸ or the general appearance of the owner in personam.⁹ Where a libel against both the vessel and its owner contains no prayer for monition and personal judgment and no service of monition and attachment of property was made on the owner, his appearance to answer the libel gives the court no jurisdiction to enter a personal judgment against him.¹⁰

[c] Conclusiveness of decrees.

In general when a proceeding in rem has been regular and after due notice, the decree renders the proceeding res adjudicata against an interested party who has failed to appear.¹² But where jurisdiction is not duly acquired in rem, the owner having appeared personally, decree cannot be made binding on the vessels' cargo owners.¹³ Nor is a decree of sale conclusive in another court where the proceeding was not in rem and the owner was not made a party.¹⁴ Since a decree in rem is binding on the whole world the death of one of the parties to the decree does not effect the right to have it executed.¹⁵ A decree of forfeiture is absolutely binding.¹⁶ A sentence of acquittal is as conclusive as a sentence of condemnation.¹⁷ Where, however, an appeal is pending in the Supreme Court a decree is not final, the appeal having the effect of suspending or vacating the decree appealed from.¹⁸ Final decree of acquittal and restitution to the claimant, when there is only one, determines only the question of prize or no prize, and not the title to the property.¹⁹ A decree of a foreign court of competent jurisdiction is conclusive evidence with respect to what

⁴The *Gazelle*, 128 U. S. 487, 32 L. ed. 496, 9 Sup. Ct. Rep. 139. See also, *Davis v. Adams*, 102 Fed. 524, 42 C. C. A. 493.

⁵The *Santa Maria*, 10 Wheat. 442, 6 L. ed. 359.

⁷*Atlantic, etc. Co. v. Alexandre*, 16 Fed. 279.

⁸The *Zodiac*, 5 Fed. 220.

⁹The *Monte A.* 12 Fed. 331.

¹⁰The *Ethel*, 66 Fed. 340, 13 C. C. A. 504.

¹²The *James G. Swan*, 106 Fed. 94.

¹³*Bailey v. Sundberg*, 49 Fed. 583, 1 C. C. A. 387.

The *Harrogate*, 112 Fed. 1019, 50 C. C. A. 665.

¹⁴The *J. W. French*, 13 Fed. 916.

¹⁵*Penhallow v. Doane*, 3 Dall. 86, 1 L. ed. 507.

¹⁶*Gelston v. Hoyt*, 3 Wheat. 316, 4 L. ed. 381.

¹⁷*Idem*.

¹⁸*United States v. Preston*, 3 Pet. 66, 7 L. ed. 601; *The Lucille*, 19 Wall. 73, 22 L. ed. 64; *The Lillie*, 42 Fed. 180.

¹⁹*Cushing v. Laird*, 107 U. S. 84, 27 L. ed. 391, 2 Sup. Ct. Rep. 196. See *Hobbs v. McLean*, 117 U. S. 580, 29 L. ed. 945; 6 Sup. Ct. Rep. 870.

it professes to decide;²⁰ and entitled to full faith and credit.¹ Hence a foreign decree, condemning a vessel for breach of blockade is conclusive as to that fact in an action on a policy of insurance.² But foreign sentence of condemnation in a prize case is not conclusive evidence that the title of the vessel was not in a neutral, since a decision on that point by the foreign court was not necessary in the adjudication of the case.³ A decree of condemnation by courts of an alleged republic not recognized by the United States will not be respected by the United States courts.⁴

[d] Liability of stipulators.

Since a stipulation takes the place of the released property⁶ the sureties therein become parties to the cause and are bound by orders subsequently made to the same extent as the claimant, the decree is as binding upon the sureties as upon the claimant.⁷ It may be entered against both at the time of the decree.⁸ Execution may be awarded against them.⁹ The decree against them need not be postponed until after the time for appeal by the principal has expired.¹⁰ Unless an amendment changes the cause of action stipulators are not released thereby.¹¹

§ 1285. Enforcement of decrees.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

Twenty-first Admiralty Rule as amended December Term 1861.¹⁴

The phrase "defendants or stipulators" in the above section apparently refers to a judgment against one or the other and not against both.¹⁵ In proceedings to carry a decree into effect the original proceedings are before the court where necessary to determine new points in the controversy.¹⁶ One admiralty court will carry into effect the determination of another, though belonging to a different nation.¹⁷ It may at the instance of a

²⁰Fitzsimmons v. Newport Ins. Co. L. ed. 685, 2 Sup. Ct. Rep. 864, ante, § 1220.
⁴Cranch, 198, 2 L. ed. 591. See also, Maley v. Shattuck, 3 Cranch, 488, 2 L. ed. 508.
¹The Garland, 16 Fed. 283.
²Croudson v. Leonard, 4 Cranch, 438, 2 L. ed. 670.
³Maley v. Shattuck, 3 Cranch, 488, 2 L. ed. 498.
⁴Nueva Anna v. Liebec, 6 Wheat. 193, 5 L. ed. 239.
⁶See ante, § 1216.
⁷Fairgrieve v. Marine Ins. Co. 112 Fed. 367, 50 C. C. A. 286.
⁸The Belgenland, 108 U. S. 156, 27 L. ed. 507.
⁹United States v. Ames, 99 U. S. 40, 25 L. ed. 295.
¹⁰The Belgenland, 108 U. S. 156, 27 L. ed. 685, 2 Sup. Ct. Rep. 864.
¹¹Fairgrieve v. Marine Ins. Co. 112 Fed. 367, 50 C. C. A. 286.
¹⁴See 1 Black, VI.
¹⁵Atlantic, etc. Co. v. Alexandre, 16 Fed. 279.
¹⁶The Santa Maria, 10 Wheat. 442, 6 L. ed. 359.
¹⁷Penhallow v. Doane, 3 Dall. 97, 1 L. ed. 507.

party, and without letters of request, enforce a decree for the payment of costs which was rendered in another district.¹⁸

§ 1286. Power to carry foreign consuls award into execution.

Said courts and commissioners [i. e., the circuit and district courts and circuit court commissioners] may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto, by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice-consul, or commercial agent [as has made an award under arbitration affecting the captain and crew of a vessel of his nation], or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul, or commercial agent: Provided, however, that the expenses of the said imprisonment, and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice-consul, or commercial agent requiring such imprisonment.

Part of R. S. § 728.

The section also confers general power to carry such awards into effect;¹ and directs the marshal to serve and execute process.²

§ 1287. Sale of property and proceeds.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the order of the court;^[a] and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.^{[b]-[c]}

Forty-first Admiralty Rule, promulgated December term, 1844.

[a] Marshal's duty.

Compensation of the marshal for the sale of vessels is provided for in

¹⁸Pennsylvania R. R. Co. v. Gil-
hooley, 9 Fed. 618.

¹Ante, § 158.

²Ante, § 646.

the statute declaring the marshal's fees.³ The marshal is not entitled to charge for an auctioneer's services.⁴

[b] Sale of property in general.

Sales in admiralty are governed by the same rules as other judicial sales.⁵ Thus the sale of a seized vessel is not completed until confirmed by the court.⁶ The sale of the vessel when made by a court of competent jurisdiction extinguishes all liens and vests a clear and undefeasible title in the purchaser.⁷ Sale of property and proceeds in admiralty is allowed before adjudication when the property is of a perishable nature.⁸ It may be allowed also in case of a ship arrested in a suit in rem.⁹ Upon interlocutory sales it is the duty of the marshal to bring the proceeds into court with an account of sales.¹¹ If they are on credit the immediate proceeds should be brought into court.¹² Where a sale of the vessel has been made and the money paid into court in lieu of such vessel before decree, a decree for the restitution of the vessel and cargo to the owner carries only what may remain of the fund and imposes no liability on the government for any part of it which may have been lost.¹³

[c] Grounds for setting sale aside.

While courts of admiralty endeavor to protect the rights of the owner, inadequacy of price is not sufficient to have a sale set aside.¹⁴ Neither will the fact that the sale was made to a proctor of the libellant be sufficient to have it set aside, in the absence of fraud.¹⁵ Likewise failure to give notice by publication while perhaps furnishing grounds for opening the decree, does not render the proceeding void.¹⁶ When, however, the property of the libellant was condemned to sale in a proceeding in which he was not a party, and which was not a proceeding in rem, nor a proceeding against the vessel in any form, the order of sale is a nullity.¹⁷ Fraud will invalidate the sale of a vessel under admiralty decree. In such case, however, it must appear that the proceeding was both collusive and fraudulent, and that the purchaser was cognizant of the fraud.¹⁸ Where the vessel has been sold under a fraudulent suit instigated by the claimant the court may order the sale set aside unless claimant gives bond, and such bond is available to the libellant in case of his recovery.¹⁹

[d] Rights and liabilities of purchasers.

A purchaser in good faith under a marshal's sale upon decree of the court will be protected in his title if the court had jurisdiction to decree

³Ante, § 712.

⁴The John E. Mulford, 18 Fed. 455.

⁵The Monte A. 9 Wheat. 648, 6 L. ed. 174.

⁶The Sue, 137 Fed. 133.

⁷The Trenton, 4 Fed. 657.

⁸See ante, § 1222.

⁹See ante, § 1219.

¹¹The Avery and Cargo, 2 Gall. 308, Fed. Cas. No. 671.

¹²Wallis v. Thornton, 2 Brock. 422. Fed. Cas. No. 17,111.

¹³United States v. Coudert, 73 Fed. 505, 19 C. C. A. 543.

¹⁴The Ruby, 38 Fed. 623.

¹⁵Idem.

¹⁶Dailey v. Doe, 3 Fed. 903.

¹⁷The J. W. French, 13 Fed. 916.

¹⁸The Garland, 16 Fed. 283.

¹⁹The New York, 93 Fed. 495.

the sale;¹ but when the vessel is improperly removed from the custody of the court pronouncing the decree, a purchaser claiming only the title of the claimants cannot interpose such title as a defense to the decree.² Where the party purchasing, however, is bona fide and sets up new interests it would seem that he is entitled to the protection sometimes afforded to a purchaser for value without notice of maritime liens.³ But where the claimant is a purchaser while the vessel was in custody for the very bill of supplies in the controversy he is entitled to no such protection.⁴ The taking of a vessel subject to liens from Detroit to Canada in order to free her from those liens and her sale there for a small claim for necessities has been held valid, it appearing that the purchaser had no knowledge of the facts.⁵ The marshal is not entitled to hire an auctioneer, and purchaser may refuse to pay such auctioneer's fees.⁶ Having refused to pay the purchase price with such fees included, he cannot be held liable for a deficiency arising on resale.⁷ A sale not officially confirmed by the court may be set aside and a new sale ordered where the bid is materially increased, notwithstanding the first purchaser has paid his money into court and has incurred expenses.⁸

[e] Disposition of proceeds.

The 43rd admiralty rule gives intervenors the right to come in when there are proceeds in the registry of the court.⁹ Intervention, however, must be on or before final decree, and if made afterward it will be disregarded.¹⁰ After the various claims have been paid out of the proceeds the owner of the res is entitled to have the residue returned to him.¹¹ Where the lien of the libelants is in excess of the amount realized by the sale, and the libelants do not claim the proceeds, they remain in the registry of the court.¹² An application made by the proctors thirty years after the original libel was brought, applying for the proceeds, will be disregarded, it not appearing clearly that there is some one legally entitled to the fund.¹³ After the decree has been satisfied and there is a surplus remaining in the registry admiralty has ancillary jurisdiction¹⁴ over matters of account and may enforce a lien whether maritime or not.¹⁵ So where a part owner of a ship has a statutory lien for advances he may be paid out of the surplus proceeds remaining in court.¹⁶ Admiralty having once taken jurisdiction it cannot refuse to settle claims according to the rights of the parties,¹⁷ and a supplemental suit may be entertained to ascertain to whom proceeds belong and to deliver them to the parties

¹Dailey v. Doe, 3 Fed. 903.

²The Rio Grande, 23 Wall. 463, 23 L. ed. 158.

³See The Morning Star, 14 Fed. 866.

⁴Idem.

⁵The Garland, 16 Fed. 283.

⁶The John E. Mulford, 18 Fed. 455.

⁷Idem.

⁸The Sue, 137 Fed. 133.

⁹See ante, § 1231.

¹⁰See ante, § 1231.

¹¹See The Lottawanna, 20 Wall. 222, 22 L. ed. 259.

¹²See The WaterWitch, 44 Fed.

95.

¹³The Waterwitch, 44 Fed. 95.

¹⁴See ante, § 3.

¹⁵The Mary Zephyr, 2 Fed. 824.

See also ante, § 1231.

¹⁶Idem.

¹⁷Covert v. The Mexford, 3 Fed.

577.

entitled.¹⁸ But a suit for the disposition of surplus money will not be allowed except by some one having a lien.¹⁹

§ 1288. Correction and vacation of decree and further proof prior to decree.

The admiralty rules fail to specify the manner or limit the time for applications to correct or vacate a decree or otherwise obtain its reconsideration and revision by the trial court. In the southern district of New York and perhaps in other districts, local rules governing some phases of the practice in this respect have been adopted. The right to seek a correction or reconsideration of a decree exists very much as in courts of equity, the procedure being perhaps even less technical than at chancery.^{[a]-[b]} Prior to the formal entry of decree courts of admiralty will also reopen a case for further proof where justice seems to require.^[c]

Author's section.

[a] Relief during the term.

Admiralty tribunals adopt the principle recognized at law and in equity,¹ that a court has large power in the correction or setting aside of its final decrees during the term when rendered, and in theory no power to do so at a subsequent term. During the term a party aggrieved by a decree may apply by motion² or petition to have it corrected or set aside. Such a proceeding has been called a motion for new trial,³ or petition for rehearing⁴ or a motion to reopen the case.⁵ The analogy of the equity procedure has had its influence in molding the admiralty practice in this respect;⁶ and petition for rehearing will not lie in admiralty after the term any more than in equity.⁷ The usual rules which require that newly discovered evidence to be ground for rehearing, be material and such as could not earlier have been procured, apply in admiralty.⁸ Rehearing will be denied if the conclusion originally reached, is adhered to.⁹ It is also usual for the district court to refuse a rehearing for new evidence, where the case is appealable, since the parties can present such evidence in the higher court.¹⁰

¹⁸Andrews v. Wall, 3 How. 573, 11 L. ed. 729.

¹⁹Grant v. Poillon, 20 How. 169, 15 L. ed. 871.

¹Ante, §§ 923, 1092, 1094, 1099.

²The Madgie, 31 Fed. 926.

³See Mainwaring v. The Delap, 1 Fed. 880; The Annex, 38 Fed. 620.

⁴See The Comfort, 32 Fed. 327, 23 Blatchf. 371; Hatch v. The Newport, 44 Fed. 300.

⁵See The Newport, 38 Fed. 669,

though it does not clearly appear that decree had there been entered.

⁶See The Annex, 38 Fed. 621.

⁷The Comfort, 32 Fed. 327; Hatch v. The Newport, 44 Fed. 300; The Annex, 38 Fed. 621.

⁸Hatch v. The Newport, 44 Fed. 300.

⁹Burdett v. Williams, 29 Fed. 542.

¹⁰Mainwaring v. The Delap, 1 Fed. 880; The Vaderland, 19 Fed. 527; The Havelah, 39 Fed. 333.

[b] Relief after the term.

After the term of the rendition of a final decree, the grounds upon which the court will revise or vacate it are certainly much restricted, though it is too much to say that there is an entire want of power in the premises.¹² An aggrieved party should, however, proceed by the more formal libel of review rather than petition or motion,¹³ though a petition may perhaps be treated as a libel of review as matter of indulgence.¹⁴ An ordinary petition for rehearing will not lie after the close of the term of final decree.¹⁵ To justify the court in entertaining a libel of review after the term there must be an absence of other remedy, as for instance, by appeal,¹⁶ or fraud in the obtaining of the decree,¹⁷ or conduct approaching or equivalent to actual fraud.¹⁸ Judge Story has also suggested, as additional grounds, clear error of law in a decree, or new proofs changing the entire merits of the case.¹⁹ So a failure to give personal notice to the owner of property disposed of by a decree in personam or in rem may be ground for libel of review.²⁰ The applicant for relief should himself be free from laches,¹ and the court has a large discretion in granting or denying the relief.²

[c] Reopening case and further proof.

Courts of admiralty frequently entertain applications for rehearing⁴ or to reopen a case for further proof, prior to the decree. Newly dis-

¹²The remedy is now well recognized. *Janvrin v. Smith*, 1 Sprague, 13, Fed. Cas. No. 7,220; *Snow v. Edwards*, 2 Low. 273, Fed. Cas. No. 13,145; *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151; *The Columbia*, 100 Fed. 892; *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31. Judge Betts concluded that libel of review would never lie after the term. *Betts Adm.* (1838) p. 102. See also *The Comfort*, 32 Fed. 327, 23 Blatchf. 371; *The Annex*, 38 Fed. 621. The question is not properly a question of power in the court, but rather of sound public policy.

¹³*Munks v. Jackson*, 66 Fed. 572, 13 C. C. A. 641; *The Columbia*, 100 Fed. 892; *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31.

¹⁴*Snow v. Edwards*, 2 Low. 273, Fed. Cas. No. 13,145; *The Madgie*, 31 Fed. 927; *The Sparkle* 7 Ben. 528. Fed. Cas. No. 13,207 where petition was used. *Pettit v. One Steel Lighter*, 104 Fed. 1002.

¹⁵*The Comfort*, 32 Fed. 327; *The Annex*, 38 Fed. 621; *Hatch v. The Newport*, 44 Fed. 301.

¹⁶*The New England*, 3 Sumn. 495,

506, Fed. Cas. No. 10,151, per Story, J. *Janvrin v. Smith*, 1 Spr. 13, Fed. Cas. No. 7,220; *Snow v. Edwards*, 2 Low. 273, Fed. Cas. No. 13,145; *Car Co. v. Hopkins*, 4 Biss. 51, Fed. Cas. No. 10,334; *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *The Columbia*, 100 Fed. 892.

¹⁷*Janvrin v. Smith*, 1 Spr. 13, Fed. Cas. No. 7,220; *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151; *The Columbia*, 100 Fed. 893 and cases cited.

¹⁸See *Munks v. Jackson*, 66 Fed. 571, 13 C. C. A. 641; *Hall v. Chisholm*, 117 Fed. 807, 55 C. C. A. 31.

¹⁹*The New England*, 3 Sumn. 506, Fed. Cas. No. 10,151.

²⁰*Janvrin v. Smith*, 1 Spr. 13, Fed. Cas. No. 7,220; *Snow v. Edwards*, 2 Low. 279, Fed. Cas. No. 13,145; *Car Co. v. Hopkins*, 4 Biss. 51, Fed. Cas. No. 10,334; *The Columbia*, 100 Fed. 890. See *Daily v. Doe*, 3 Fed. 903.

¹*Munks v. Jackson*, 66 Fed. 572, 13 C. C. A. 641; *The New England*, 3 Sumn. 506, Fed. Cas. No. 10,151.

²*Munks v. Jackson*, 66 Fed. 572, 13 C. C. A. 641.

⁴*The Havilah*, 39 Fed. 333.

covered evidence is a common ground for such applications by the parties to the controversy and it is not unusual for the court to order further proofs on its own motion.⁵ Since an admiralty case is heard *de novo* on appeal, there is the same power to order further proofs in the appellate as in the district court.

§ 1289. Final record to contain what.

In . . . admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.

R. S. § 750, U. S. Comp. Stat. 1901, p. 591.

This provision was first enacted in 1853⁷ and specifies also equity causes.⁸ Final record as provided for by it is intended to answer the purpose of the enrollment of the decree under the former chancery practice. No final record is required where there has been no adjudication between the parties except in cases where there has been an adjudication of costs to the officers; in such cases record should be made.⁹ The provision should be complied with strictly and the fact that the process, pleadings and decrees are recorded in the district court is no reason for omitting them from the record of the circuit court on appeal.¹⁰ The final record must correspond with the judgment record of the common law.¹¹ Provisions as to record on appeal in admiralty are given in a subsequent chapter.¹²

⁵See *The Francis Wright*, 7 Ben. thaler, 93 Fed. 307. See also *Blain* 88, Fed. Cas. No. 5,044. v. Ins. Co. 30 Fed. 667.

⁷Act, Feb. 26, 1853, c. 80, § 1, 10 Stat. 163.

⁸Ante, § 1100.

⁹Consolidated, etc. Co. v. Detten-

¹⁰*The Thomas Fletcher*, 24 Fed. 481.

¹¹*The Thomas Fletcher*, 24 Fed. 481; *Blain v. Ins. Co.* 30 Fed. 667.

¹²See post, § 1958 et seq.

CHAPTER 40.

PROCEEDINGS FOR LIMITATIONS OF LIABILITY.

- § 1298. In what district limitation of liability proceedings to be had.
- § 1299. Libel or petition for limitation of liability.
- § 1300. Order for payment of owners' interest into court or equivalent.
- § 1301. The monition to persons having claims.
- § 1302. Order restraining further prosecution of suits.
- § 1303. Proof of claims and pro rata payment.
- § 1304. Legal liability for claims presented, or right to exemption, may be contested.
- § 1305. Preceding rules to apply on appeal.

§ 1298. In what district limitation of liability proceedings to be had.

The said libel or petition [i. e. for limitation of liability as provided in rule 54¹] shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ships have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

Fifty-seventh Admiralty Rule, as amended April 22, 1889.²

The 57th rule was originally promulgated May 6, 1872.³ The amendment of 1889 consisted in the addition of the sentence beginning "When

¹Post, § 1299.
²130 U. S. 705.

³13Wall. xiv.

the said ship or vessel has been libeled," etc. The rules regarding limitation of liability are undoubtedly valid.⁴ The court of the district in which the vessel is found or libelled or owners are sued, is the proper one in which to obtain the limited liability decree.⁵ An owner who fails to institute proceedings until after a suit has been brought by the loser must commence them in the same district court as that in which such suit is brought.⁶ In case of total loss at sea where no district court has or can have any fund to distribute, resort may probably be had to the courts of the district in which the owners reside,⁷ or where the vessel perished, if within any district.⁸ In case where a vessel was lost at sea and part of the wreckage washed ashore the filing of a libel in the district of the port to which the vessel was bound was held sufficient to give the court jurisdiction, although it did not appear that the remnants of the wreck were within that district.⁹ The proceedings may be instituted in a district where a fund representing the lost vessel is in litigation, although the petitioners reside in another district.¹⁰ While the statute provides that "any court of competent jurisdiction"¹¹ may take cognizance of the proceedings, this means any district court;¹² and not the circuit courts.¹³ The latter have no jurisdiction in such cases except formerly on appeal.¹⁴ The Supreme Court, however, on reversing a decree of the circuit court directed that further proceedings for securing a limited liability be had in the circuit instead of the district court.¹⁵

Jurisdiction under the section is conferred by the filing of the libel or petition by the owners, with offer to give stipulation;¹⁶ and is in its nature exclusive.²⁰ The presence of the vessel is not necessary to the court's jurisdiction.¹ Nor is jurisdiction lost when the vessel has been released on stipulation and has gone out of the jurisdiction of the court.² Limitation of liability may be allowed although the liability sought to be enforced by the losers arises under a State law.³ Where the ship owners seeking to limit their liability, have surrendered only one of two vessels held by the court to be liable, the court has power to seize the other, and such is the proper and only equitable course when the suits by the libel-

⁴Providence, etc. S. S. Co. v. Hill, U. S. Comp. Stat. 1901, pp. 2943, Mfg. Co. 109 U. S. 578, 27 L. ed. 2944.
1038, 3 Sup. Ct. Rep. 379, 617.

⁵Providence, etc. S. S. Co. v. Hill Mfg. Co. 109 U. S. 598, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; see also In re Morrison, 147 U. S. 33, 37 L. ed. 67, 13 Sup. Ct. Rep. 246.

⁶The Alpena, 8 Fed. 280, 10 Biss. 436.

⁷See Providence, etc. Co. v. Hill Mfg. Co. 109 U. S. 598, 27 L. ed. 1045, 3 Sup. Ct. Rep. 379, 617.

⁸Ibid.

⁹Ex parte Slayton, 105 U. S. 451, 26 L. ed. 1066.

¹⁰In re Leonard, 14 Fed. 53.

¹¹See R. S. §§ 6, 4282, 4284, 4285.

¹²Elwell v. Geibic, 33 Fed. 71.

¹³Idem.

¹⁴The Mary Lord, 31 Fed. 417.

¹⁵The Benefactor, 103 U. S. 247, 26 L. ed. 351. See post, § 1305.

¹⁶In re Morrison, 147 U. S. 14,

37 L. ed. 60, 13 Sup. Ct. Rep. 246.

²⁰Black v. Southern Pac. Ry. Co. 39 Fed. 565.

¹Gleason v. Duffey, 116 Fed. 298, 54 C. C. A. 100.

²In re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

³Butler v. Boston, S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

ants have been delayed, and the ship's owners have become insolvent.⁴ The fact that the claimant has been paid less than the stipulated value of the vessel does not oust the court of jurisdiction, where claimant's original claim was greater than its value.⁵ So also where the claims have been subsequently reduced, so that the amount stipulated for by the owners is less than the total claims, the court still has jurisdiction.⁶

§ 1299. Libel or petition for limitation of liability.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled, "An act to limit the liability of shipowners and for other purposes," now embodied in §§ 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf.^{[a]-[c]}

First part of 54th Admiralty Rule, as amended Jan. 26, 1891.⁷

[a] Procedure in general.

The 54th rule was originally promulgated May 6, 1872.⁸ The amendment changed the portion of the rule given above, only in the mode in which the limited liability act is referred to and identified. The remainder of the rule is given in the three following sections.⁹ The power of the Supreme Court to promulgate this and the following rules regarding limitation of liability has been frequently affirmed.¹⁰ The owner may institute proceedings to obtain limited liability without waiting for suit,¹¹ and the right exists whether the suit be in rem or in personam, and irrespective of subsequent reclaiming and repair of ship.¹² Limitation of liability may be claimed in

⁴Oregon, etc. Nav. Co. v. Balfour, Mfg. Co. 109 U. S. 578, 27 L. ed 90 Fed. 295, 33 C. C. A. 57. 1038, 3 Sup. Ct. Rep. 379, 617.

⁵Briggs v. Day, 21 Fed. 727.

⁶The Folcheste, 42 Fed. 180.

7137 U. S. 711.

⁸13 Wall. xii.

⁹Post, §§ 1300-1302.

¹⁰See Providence S. S. Co. v. Hill 1150.

¹¹The Alpena, 8 Fed. 280, 10 Biss.

436; Ex parte Slayton, 105 U. S.

451, 26 L. ed. 1066.

¹²The City of Norwich, 118 U. S.

502, 30 L. ed. 134, 6 Sup. Ct. Rep.

the answer to a pending suit;¹³ or it may be claimed by an independent proceeding for surrender of ship or payment into court of the value thereof.¹⁴ If set up as a defense in the answer there is no need of payment of money into court or surrender of the vessel, but the owners may plead exemption and have decree taken against them for the then value of the ship and freight.¹⁵ In cases of total loss the pleading of the limitation by way of answer is generally the best mode of proceeding.¹⁶ When two or more more parties having distinct claims against the owners of the vessel, are brought into proceedings for limitation of liability a decree awarding different claims to the several claimants is several as to them, and any of them may appeal without making the others parties or notifying them.¹⁷

[b] Time for commencing action.

Just how long the owner may wait after suit is brought against him is difficult to determine.¹⁸ Certainly relief should not be granted to him under the limited liability act except on the condition of his compensating the other party for losses caused by his delay.¹⁹ Suit to limit liability may be commenced after suit for damages has been filed,²⁰ and even after decree has been rendered.¹ In such case, however, the question of liability of the ship owner is *res adjudicata* and cannot be revived.² Where full satisfaction has been obtained against the owner proceedings to limit liability will not be allowed.³ In collision cases where both vessels are in default proceedings to limit liability cannot be brought until the balance of damage has been struck.⁴

[c] Knowledge and privity.

In general knowledge and privity of the person in charge of the vessel is not such knowledge and privity within the meaning of the above section as will effect the right of the owner to limited liability.⁷ The master's knowledge of defective rigging cannot be imputed to the owner so as to effect his right to limited liability;⁸ nor can employee's negligent in-

¹³The Scotland, 105 U. S. 34, 26 L. ed. 1001; *Craig v. Continental Ins. Co.* 141 U. S. 645, 35 L. ed. 888, 12 Sup. Ct. Rep. 99; *The Rosa*, 53 Fed. 135.

¹⁴The Great Western, 118 U. S. 525, 30 L. ed. 156, 6 Sup. Ct. Rep. 1172. See post, § 1300.

¹⁵The Doris Eckhoff, 41 Fed. 156; *The Scotland*, 105 U. S. 34, 26 L. ed. 1001; *The Rose Culkin*, 52 Fed. 328.

¹⁶*Providence S. S. Co. v. Hill Mfg. Co.* 109 U. S. 594, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617.

¹⁷*Short v. The Columbia*, 73 Fed. 226, 19 C. C. A. 436.

¹⁸*The Benefactor*, 103 U. S. 245, 26 L. ed. 351.

¹⁹*The Benefactor*, 103 U. S. 245, 26 L. ed. 351. See also *The Ocean Spray*, 117 Fed. 971.

²⁰*In re Meyer*, 74 Fed. 881.

¹*The City of Norwich*, 118 U. S. 489, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100.

²*The Mary and Elizabeth*, 12 Fed. 627.

³*The Benefactor*, 103 U. S. 245, 26 L. ed. 351.

⁴*The North Star*, 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41.

⁷*Craig v. Continental Ins. Co.* 141 U. S. 646, 35 L. ed. 886, 12 Sup. Ct. Rep. 97.

⁸*Quinlan v. Pew*, 56 Fed. 115, 5 C. C. A. 438.

spection of a boiler effect that right;⁹ nor can the careless loading of the vessel by the master which caused the vessel to capsize.¹⁰ Where, however, the unseaworthy condition of a vessel would be shown by proper examination, her owners are charged with knowledge thereof and any injury to passengers is not without "privity or knowledge" so as to entitle owners to the benefit of limited liability.¹¹ The above section embraces all injuries done by vessels without the privity or knowledge of the owners, whether consummated on land or water.¹² Where one of several joint owners has knowledge of an unjustifiable deviation in the vessel's course he is liable for subsequent loss of the cargo, in the proportion which his share of the vessel at the time of affreightment bears to the whole loss, the other joint owners being entitled to limitation of liability.¹³

§ 1300. Order for payment of owners interest into court or equivalent.

Thereupon [i. e., after the filing of a libel or petition in the district court for limitation of liability, as stated in the preceding section¹⁷] said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act.

Part of 54th Admiralty Rule, as amended Jan. 26, 1891.¹⁸

The rule was originally promulgated May 6, 1872.¹⁹ The amendment of 1891 changed the portion of the rule given above, only in the insertion of commas after "and her freight," "stipulation," and "sureties," without any apparent intention of affecting the meaning of the provisions. The portions of the 54th rule preceding and following that above given are contained in the preceding and following sections of the text.²⁰ R. S. § 4285¹ declares the transfer of the vessel and freight to a trustee for the benefit of claimants a sufficient compliance with the statutory provisions regard-

⁹The *Annie Faxon*, 75 Fed. 312, 21 C. C. A. 366.

¹⁰The *Colima*, 82 Fed. 665. See also on the point *In re Louisville*, etc. Co. 95 Fed. 996.

¹¹*In re Myers, etc. Co.* 57 Fed. 240. Affirmed in *The Republic*, 61 Fed. 109, 9 C. C. A. 386.

¹²*In re Goodrich, etc. Co.* 26 Fed. 713.

¹³*In re Meyer*, 74 Fed. 881.

¹⁴*Ante*, § 1299.

¹⁵137 U. S. 711.

¹⁶13 Wall. xii.

²⁰*Ante*, § 1299. Post, §§ 1301, 1302.

¹U. S. Comp. Stat. 1901, p. 2944.

ing limitation of liability. Under the above rule the owner, in order to secure limited liability, must make payment into court of the appraised value, or give stipulation, or transfer his interest to a trustee.² In proceedings for the limitation of liabilities prior notice of damage creditors of an appraisement is not necessary and an ex parte appraisement is not void.³ The stipulation stands in place of the vessel and her freight.⁴ New stipulation may be ordered by the court and on failure to comply it can stay further proceedings and deny all relief.⁵ The price realized by the sale in limited liability proceedings where a stipulation is to be given, is not conclusive, and the court may, upon cause shown, require a bond for the actual value as proved.⁶ Where the owner has obtained appraisement under this rule it is established that the bond given should bear interest, being a substitute for the benefit which a surrender of the vessel would be to those entitled to it.⁷ So also where the limitation of liability is set up in the answer, and the vessel is not surrendered nor appraisement had or bond given, the shipowner is chargeable with interest on the value of the vessel.⁸ Stipulators must also pay the taxable costs, including costs of appraisal.⁹ The giving of a stipulation for value of the vessel in a collision case is no bar to a subsequent proceeding for the limitation of liability nor any bar to the surrender of the vessel herself in that proceeding, and she may still be surrendered in exoneration of liability even though she made several voyages after the giving of such stipulation, provided there was no waiver of the right and her value was unimpaired.¹⁰

§ 1301. The monition to persons having claims.

Upon compliance with such order [i. e., the order for payment of the owner's interest into court, or stipulation or transfer, as specified in the preceding section¹⁵] the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the postoffice, or otherwise, as the court, in its discretion, may direct.

Part of 54th Admiralty Rule, as amended Jan. 26, 1891.¹⁶

²Gleason v. Duffy, 116 Fed. 298, Harris, 57 Fed. 243, 6 C. C. A. 320; 54 C. C. A. 100; The Scotland, 105 The Favorite, 12 Fed. 213, 11 Biss. U. S. 34, 26 L. ed. 1001. 283. See also Smith v. Booth, 112

³In re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

Fed. 553.

⁴In re Morrison, 147 U. S. 35, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

⁸Smith v. Booth, 112 Fed. 553.

⁵Idem.

⁹The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

⁶In re U. S. Grant, 45 Fed. 642.

¹⁰Eldredge v. The Rose Culkin, 52 Fed. 328.

⁷The Battler, 58 Fed. 704; In re

The 54th rule was originally promulgated May 6, 1872.¹⁷ The amendment changed the portion of the rule above given only in the substitution of "re-served" for "served." The preceding and following portions of rule 54 are contained in preceding and following sections of the text.¹⁸ This provision of the rule is in conformity with the proceeding suggested in an early case.¹⁹

§ 1302. Order restraining further prosecution of suits.

The said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

Concluding part of 54th Admiralty Rule, as amended Jan. 26, 1891.³

The 54th rule was originally promulgated May 6, 1872.⁴ The amendment of 1891 changed the foregoing portion of it only in omitting the comma previously inserted before the word "also." The remainder of the rule is contained in preceding sections of the text.⁵ The statute upon which the above rule is founded⁶ provides that "all claims against the owners shall cease." The restraining order authorized by this rule may issue against proceedings in a State court notwithstanding the statute prohibiting a United States court from enjoining State courts.⁷ It is well established that in proceedings for limited liability, an injunction will lie to restrain further prosecution of suits against the owner or owners.⁸ So the owner may plead the pendency of his limitation of liability proceedings, by way of answer or defense in a suit against him for damages.⁹

§ 1303. Proof of claims and pro rata payment.

Proof of all claims which shall be presented in pursuance of said motion shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as afore-

¹⁵Ante, § 1300.

¹⁶137 U. S. 711.

¹⁷13 Wall. xii.

¹⁸Ante, §§ 1299, 1300, post, § 1302.

¹⁹Norwich Co. v. Wright, 13 Wall. 104, 20 L. ed. 585.

³137 U. S. 711.

⁴13 Wall. xii.

⁵Ante, §§ 1299-1301.

⁶R. S. § 4285, 3 U. S. Comp. Stat. 1901, p. 2944.

⁷In re Whitelaw, 71 Fed. 738. See ante, § 20. f 1

⁸Norwich Co. v. Wright, 13 Wall. 125, 20 L. ed. 585; In re Whitelaw, 71 Fed. 733; Black v. S. P. Ry. 39 Fed. 565; The City of Columbus, 22 Fed. 460; The Amsterdam, 23 Fed. 112.

⁹Providence S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617.

said, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

Fifty-fifth Admiralty Rule, promulgated May 6, 1872.¹²

Owner's interest having been paid into court claimants may be notified to make proof.¹³ While not expressly required by the above rule, it is held that this making of proof must be treated as a pleading in the nature of a libel and should set forth the various allegations of fact upon which claimant relies.¹⁴ Whether there has been a transfer of the vessel and freight to the court, or transfer of interest to referee, claimant is entitled to his pro rata share in proportion to his loss.¹⁵

§ 1304. Legal liability for claims presented, or right to exemption, may be contested.

In the proceedings aforesaid [i. e., for limitation of liability under rules 54 and 55¹⁷], the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioners under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

Fifty-sixth Admiralty Rule, promulgated May 6, 1872.¹⁸

The petition to limit liability should state the facts by reason of which exemption is claimed,¹⁹ and a claimant contesting the right to limit liability must take issue by answer to the petition and such answer must apparently be full, explicit and distinct to each separate article and allegation.²⁰

¹²13 Wall. xiii.

¹³In re Morrison, 147 U. S. 36, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

¹⁵The Scotland, 105 U. S. 34, 26 L. ed. 1005.

¹⁴In re Davidson, etc. Co. 133 Fed. 412.

¹⁷Ante, § 1299-1303.

¹⁸13 Wall. xiii.

¹⁹The Sacramento, 131 Fed. 373, The Trader, 129 Fed. 462.

²⁰In re Davidson etc. Co. 133 Fed.

§ 1305. Preceding rules to apply on appeal.

All the preceding rules and regulations¹ for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

Fifty-eighth Admiralty Rule, promulgated March 30, 1881.²

Since the promulgation of the foregoing rule the appellate jurisdiction has been transferred from the circuit court to the circuit court of appeals.³ Rule 8 of the latter courts declares that "the practice shall be the same as in the Supreme Court of the United States so far as the same shall be applicable."⁴ And in the second circuit, and perhaps in others, there are additional rules regarding admiralty appeals. The practice in the circuit courts of appeal conforms rather to the Supreme Court than to the old circuit court practice on appeal, and it would seem that the 58th admiralty rule, *supra*, has now little operative force.⁵ Prior to the act creating the circuit court of appeal this rule was referred to in several cases.⁶

¹Ante, §§ 1298-1304.

²103 U. S. xiii.

³Ante, § 77.

⁴Post, § 1888.

⁵See *The Beeche Dene*, 55 Fed. 526,
5 C. C. A. 208.

⁶*The Luckenback*, 26 Fed. 871; *The Mary Lord*, 31 Fed. 417. See also, *The Benefactor*, 103 U. S. 239, 26 L. ed. 351.

CHAPTER 41.

PROCEDURE IN PRIZE CASES.

- § 1315. Filing of libel, warrant and evidence.
- § 1316. Appointment of prize commissioners.
- § 1317. Duties of prize commissioners.
- § 1318. Custody and safe keeping of prize property.
- § 1319. Appraisal of property used and not sent in.
- § 1320. Proceedings for adjudication where property is not sent in.
- § 1321. Delivery of prize property on stipulation.
- § 1322. When property may be sold.
- § 1323. Mode of making sale.
- § 1324. Transfer of property to another district for sale.
- § 1325. Security for costs in prize cases.
- § 1326. Costs and expenses.
- § 1327. Payment of expenses from prize fund.
- § 1328. Accounts of clerks of district courts.
- § 1329. Allowances and commissions to marshals.
- § 1330. Compensation of district attorney and prize commissioners.
- § 1331. Accounts of district attorney and prize commissioners.
- § 1332. Commissions of auctioneers.
- § 1333. Amendment on appeal in prize cases.
- § 1334. Prize causes after appeal.

§ 1315. Filing of libel, warrant and evidence.

Upon receiving the report of the prize-master [sent into port in charge of a prize], directed by the preceding section [i. e., as to condition of the prize, circumstances of capture, etc.], the attorney of the United States for the district shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court, directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof; and to that end shall see that the proper preparatory evidence is taken by the prize-commissioners, and that the prize-commissioners also take the depositions *de bene esse* of the prize-crew, and of other transient persons cognizant of any facts bearing on condemnation or distribution.

R. S. § 4618, U. S. Comp. Stat. 1901, p. 3128.

The above section was carried forward into the Revised Statutes from an act of 1864.¹ R. S. § 4619² makes it the duty of the district attorney to represent the government in prize cases. The jurisdiction of a prize court is strictly in rem, and usually confined to the adjudication of the question of prize or no prize, the relative rights of the claimants not being always settled.³

§ 1316. Appointment of prize commissioners.

Any district court may appoint prize-commissioners, not exceeding three in number; of whom one shall be a retired naval officer, approved by the Secretary of the Navy, who shall receive no other compensation than his pay in the Navy, and who shall protect the interests of the captors and of the Department of the Navy in the prize-property; and at least one of the other shall be a member of the bar of the court, of not less than three years' standing, and acquainted with the taking of depositions.

R. S. § 4621, U. S. Comp. Stat. 1901, p. 3129.

The above section was carried forward into the Revised Statutes from an act of 1864.⁴

§ 1317. Duties of prize commissioners.

The prize-commissioners, or one of them, shall receive from the prize-master the documents and papers, and inventory thereof, and shall take the affidavit of the prize-master required by section forty-six hundred and seventeen, and shall forthwith take the testimony of the witnesses sent in, separate from each other, on interrogatories prescribed by the court, in the manner usual in prize-courts; and the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority from the court; and witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize-commissioners shall also take depositions de bene esse of the prize-crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize-property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination, and report to the court whether

¹Act June 30, 1864, c. 174, § 4, 13 Stat. 307.

²Ante, § 530.

³Cushing v. Laird, 107 U. S. 69, 27 L. ed. 391, 2 Sup. Ct. Rep. 196.

See also Hobbs v. McLean, 117 U. S. 580, 29 L. ed. 945, 6 Sup. Ct. Rep. 870.

⁴Act June 30, 1864, c. 174, § 5, 13 Stat. 307.

any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time, report to the court anything relating to the condition of the property, or its custody or disposal, which may require any action by the court, but the custody of the property shall be in the marshal only. They shall also seasonably return into court, sealed and secured from inspection, the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken *de bene esse*, and their own inventory of the prize-property; and if the captured vessel, or any of its cargo or stores, are such as in their judgment may be useful to the United States in war, they shall report the same to the Secretary of the Navy.

R. S. § 4622, U. S. Comp. Stat. 1901, p. 3129.

The above section was carried forward into the Revised Statutes from an act of 1864.⁵

§ 1318. Custody and safe keeping of prize property.

The marshal shall safely keep all prize-property under warrant from the court, and shall report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold. He shall insure prize-property, if in his judgment it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize-commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court, and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal shall forward to the Secretary of the Navy, whenever and as often as the Secretary of the Navy may require it, a full statement of the condition of each prize and of the disposal made thereof.

R. S. § 4623, U. S. Comp. Stat. 1901, p. 3130.

The above section was carried forward into the Revised Statutes from an act of 1864.⁷

⁵The *Olinde Rodrigues*, 174 U. S. 13 Stat. 308.

⁷Act June 30, 1864, c. 174, § 7, 13 Stat. 308.

§ 1319. Appraisal of property used and not sent in.

Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize-property taken for or appropriated to the use of the government, the department for whose use it is taken or appropriated shall deposit the value thereof with the Assistant Treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

R. S § 4624, U. S. Comp. Stat. 1901, p. 3130.

The above section was carried forward into the Revised Statutes from an act of 1864.^s

§ 1320. Proceedings for adjudication where property is not sent in.

If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court as a court of prize, move for a monition to show cause why such proceedings

^sAct June 30, 1864, c. 174, § 27,
13 Stat. 314.

shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.

R. S. § 4625, U. S. Comp. Stat. 1901, p. 3130.

The above section was carried forward into the Revised Statutes from an act of 1864.¹¹

§ 1321. Delivery of prize property on stipulation.

No prize-property shall be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property shall satisfy the court that the same has a peculiar and intrinsic value to him, independent of its market value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if satisfied that the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby; but a satisfactory appraisement shall be first made, and an opportunity given to the district attorney and naval prize-commissioner to be heard as to the appointment of appraisers. Any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer, in the same manner as proceeds of a sale.

R. S. § 4626, U. S. Comp. Stat. 1901, p. 3131.

The above section was carried forward into the Revised Statutes from an act of 1864.¹²

§ 1322. When property may be sold.

Whenever any prize-property is condemned, or at any stage of the proceedings is found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same are disproportionate to its value, the court shall order a sale of such property; and whenever, after the return-day on the libel, all the parties in interest who have appeared in the cause agree

¹¹Act June 30, 1864, c. 174, § 28, 13 Stat. 314.

¹²Act June 30, 1864, c. 174, § 28, 13 Stat. 313.

thereto, the court may make such order; and no appeal shall operate to prevent the making or execution of such order.

R. S. § 4627, U. S. Comp. Stat. 1901, p. 3131.

The above section was carried forward into the Revised Statutes from an act of 1864.¹⁵

§ 1323. Mode of making sale.

Upon a sale of any prize-property by order of the court, the Secretary of the Navy shall employ an auctioneer of known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and disposing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize-commissioner, and the goods shall be open to inspection at least three days before the sale.

R. S. § 4628, U. S. Comp. Stat. 1901, p. 3131.

The above section was carried forward into the Revised Statutes from an act of 1864.¹⁶

§ 1324. Transfer of property to another district for sale.

Whenever it appears to the court, in the case of any prize-property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same, with proper orders as to the time and manner of selling the same. It shall be the duty of the marshal so to transfer the property, and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending. The necessary expenses attending the insuring, transferring, receiving, keeping, and selling the property shall be a charge upon it and upon the pro-

¹⁵Act June 30, 1864, c. 174, § 8, 13 Stat. 308.

¹⁶Act June 30, 1864, c. 174, § 8, 13 Stat. 308.

ceeds thereof; and whenever any such expense is paid in advance by the marshal, and he is not repaid from the proceeds, any amount not so repaid shall be allowed to him, as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or by special direction in any cause, require a marshal to transfer any prize-property from the district in which the judicial proceedings are pending, to any other district for sale; and the same proceedings shall be had as if such transfer had been made by order of the court.

R. S. § 4629, U. S. Comp. Stat. 1901, p. 3132.

The above section was carried forward into the Revised Statutes from an act of 1864.¹⁹

A vessel which, after condemnation, is taken by the marshal into another district for sale, remains under the actual jurisdiction of the court wherein condemnation was had; and a third person who claims to have rendered salvage service to her in such other district, will not be allowed to libel her there to recover compensation.²⁰

§ 1325. Security for costs in prize cases.

The court may require any party, at any stage of the cause, [i. e. a prize case] and on claiming an appeal, to give security for costs.

R. S. § 4638, U. S. Comp. Stat. 1901, p. 3135.

The above section was carried forward into the Revised Statutes from an act of 1864.²

§ 1326. Costs and expenses.

All costs and all expenses incident to the bringing in, custody, preservation, insurance, sale or other disposal of prize-property, when allowed by the court, shall be a charge upon such property, and shall be paid from the proceeds thereof, unless the court shall decree restitution free from such charge.

R. S. § 4639, U. S. Comp. Stat. 1901, p. 3135.

The above section was carried forward into the Revised Statutes from an act of 1864.⁴ If it appears that probable cause for capture existed, all

¹⁹Act June 30, 1864, c. 174, § 30, 13 Stat. 315.

²Act June 30, 1864, c. 174, § 15, 13 Stat. 311.

²⁰In re White Star, etc. Co. 91 Fed. 285.

⁴Act June 30, 1864, c. 174, § 14, 13 Stat. 311.

costs and expenses may be charged against the vessel, though restitution of the vessel herself is awarded.⁵

§ 1327. Payment of expenses from prize fund.

No payments shall be made for any prize-fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, shall be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court shall make its order or orders on the assistant treasurer to pay the costs and charges allowed and unpaid; and in case the final decree shall be for restitution, or in case there shall be no money subject to the order of the court in the cause, any costs or charges allowed by the court, and not paid by the claimants, shall be a charge upon, and be paid out of, the fund for defraying the expenses of suits in which the United States is a party or interested.

R. S. § 4640, U. S. Comp. Stat. 1901, pp. 3135, 3136.

The above section was carried forward into the Revised Statutes from an act of 1864.⁷

§ 1328. Accounts of clerks of district courts.

The clerk of each district court shall render, to the Secretary of the Treasury and the Secretary of the Navy, a semi-annual statement of all the sums allowed by the court, and ordered to be paid, within the previous half-year, to the district attorney and prize-commissioners for services, and to marshals for fees and commissions; and he shall, in all prize-causes in the district, for the purpose of the final decree of distribution, ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court, in each prize-cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and shall send copies of all final decrees of distribution to the Secretary of the Treasury and the Secretary of the Navy; and shall draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue.

⁵The *Olinde Rodrigues*, 174 U. S. 175 U. S. 395, 44 L. ed. 210, 20 Sup. 510, 43 L. ed. 1065, 19 Sup. Ct. Rep. Ct. Rep. 148.

851. See also *The Buena Ventura*, ⁷Act June 30, 1864, c. 174, § 14, 13 Stat. 311.

For these services he shall be entitled to receive the sum of twenty-five dollars in each prize-cause, which shall be in full for the services required by this action.

R. S. § 4644, U. S. Comp. Stat. 1901, p. 3137.

The above section was originally enacted in 1864.⁸

§ 1329. Allowances and commissions to marshals.

The marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale or other disposal of the prize-property, and for executing any order of the court respecting the same, and shall have a commission of one-quarter of one per centum on vessels, and of one-half of one per centum on all other prize-property, calculated on the gross proceeds of each sale; and if, after he has had any prize-property in his custody, and has actually performed labor and incurred responsibility for the care and preservation thereof, the same is taken by the United States for its own use without a sale, or if it is delivered on stipulation to the claimants, he shall, in case the same is condemned, be entitled to one-half the above commission on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.

R. S. § 4645, U. S. Comp. Stat. 1901, p. 3137.

The above section was originally part of the act of 1864.⁹ Since 1896 marshals have been placed upon a salary basis.¹⁰

§ 1330. Compensation of district attorney and prize commissioners.

The district attorney and prize-commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize-cause, to be adjusted and determined by the court, and to be paid as costs in the cause.

R. S. § 4646, U. S. Comp. Stat. 1901, p. 3138.

The above was part of the prize act of 1864.¹² Since 1896 district attorneys have been placed upon a salary basis in lieu of fees.¹³ The act

⁸Act June 30, 1864, c. 174, § 17,
13 Stat. 312.

⁹Act June 30, 1864, c. 174, § 18,
13 Stat. 312.

¹⁰Ante, §§ 633, et seq.

¹²Act June 30, 1864, c. 174, § 20,
13 Stat. 312.

¹³Ante, § 509, et seq.

just mentioned, however, did not repeal the above section nor the one following, as to district attorneys. The services of such officers in prize causes are special, and the court may properly make a suitable allowance¹⁴ whether the services are rendered within or without the district.¹⁵

§ 1331. Accounts of district attorney and prize commissioners.

Each district attorney and prize commissioner, except the naval officer, shall render to the Attorney General an annual account of all sums he shall have received for all services in prize-causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars a year, in addition to the maximum compensation allowed to be retained by him; under the provisions of Title XIII., "The Judiciary," or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize commissioner shall be allowed to retain a sum not exceeding three thousand dollars a year, which shall be in full for all his official services in prize causes; and any excess over those respective amounts shall be paid by the officer receiving the same into the Treasury of the United States, and shall be credited to the fund for paying naval pensions.

R. S. § 4647, U. S. Comp. Stat. 1901, p. 3138.

The above section was carried forward into the revised statutes from act of 1864.¹⁷ It is not repealed by an act of 1896, putting district attorneys on a fee basis.¹⁸

§ 1332. Commissions of auctioneers.

The auctioneers employed to make sales of prize-property shall be entitled to receive commissions by a scale to be established by the Secretary of the Navy, not to exceed, in any case, one half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on that sum or other prize-property, which shall be in full for expenses, as well as for services; and in case no such scale shall be established, they shall be entitled to receive such compensation as the court shall deem just under the circumstances of each case.

R. S. § 4650, U. S. Comp. Stat. 1901, p. 3138.

The above section was part of the Prize act of 1864.¹⁹

¹⁴The Adula, 127 Fed. 853.

¹⁸See ante, § 1330, note.

¹⁵Ibid.

¹⁹Act June 30, 1864, c. 174, § 22,

¹⁷Act June 30, 1864, c. 174, § 21, 13 Stat. 313.

¹³Stat. 312.

Fed. Proc.—76.

§ 1333. Amendment on appeal in prize cases.

The Supreme Court may, if, in its judgment, the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize cases, or allow a prize appeal therein, if it appears that any notice of appeal or of intention to appeal was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein.

R. S. § 4636, U. S. Comp. Stat. 1901, p. 3135.

The above section was originally enacted in 1873.²⁰ The first part of above provision down to and including "prize cases" is reproduced in precisely the same form in R. S. § 1006.¹

§ 1334. Prize causes after appeal.

Any districts court may, notwithstanding an appeal to the Supreme Court, in any prize cause, make and execute all necessary orders for the custody and disposal of the prize property, and, in case of an appeal from a decree of condemnation, may proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein.

R. S. § 565, U. S. Comp. Stat. 1901, p. 461.

The above section was originally enacted in 1864.³ Substantially the same provision is contained in R. S. § 4637,⁴ which declares that "notwithstanding any appeal to the Supreme Court, the district court may make and execute all necessary orders for the custody and disposal of the prize property; and in case of appeal from a decree of condemnation, may still proceed," etc., the remainder being identical with R. S. § 565, supra. By an act of 1899 "All provisions of law authorizing the distribution among the captors of the whole or any portion of the proceeds of vessels or any property hereafter captured, condemned as prize . . . are hereby repealed." Hence the latter portion of R. S. §§ 565 and 4637 are repealed by the act of 1899.⁵

²⁰Act March 3, 1873, c. 230, § 2, 17 Stat. 556. ⁴U. S. Comp. Stat. 1901, p. 3135, By an act of 1899.

¹U. S. Comp. Stat. 1901, p. 714.

³Act June 30, 1864, c. 174, § 13, 13 Stat. 310. ⁵Act March 3, 1899, c. 413, § 13, U. S. Comp. Stat. 1901, p. 1072.

CHAPTER 42.

PROCEDURE IN CAUSES UNDER COMMERCE LAWS.

- § 1345. Procedure in suits for violation of anti-trust acts of 1890-1894.
- § 1346. —bringing in additional parties.
- § 1347. Expediting hearing of suits by United States under anti-trust and commerce laws—personnel of court.
- § 1348. Election of person aggrieved by carrier to complain to commission or sue.
- § 1349. Proceedings against carrier failing to obey Commission's award of damages—venue, etc.
- § 1350. —time for filing claim and bringing suit.
- § 1351. —parties—joint action—service of process.
- § 1352. —recovery.
- § 1353. Proceedings on violation of order other than for damages—petition, service, etc.
- § 1354. —injunction or other process against offending carrier.
- § 1355. —appeal—priority of hearing—not a supersedeas.
- § 1356. Suits against Commission—venue—expediting hearing—appeals and priority—interlocutory injunction and appeal.
- § 1357. Copies of papers, schedules and reports filed with Commission, as evidence.
- § 1358. Mandamus to compel obedience to commerce acts.
- § 1359. Proceedings in equity by commission against carrier discriminating in rates, etc.—petition and hearing.
- § 1360. —process against such carrier to enforce published rates.
- § 1361. —suits by injured party for damages, not precluded.
- § 1362. What parties may be included in commerce cases.
- § 1363. Reports of accidents made to Commission not admissible evidence.
- § 1364. No person excused from testifying because of possible incrimination.
- § 1365. Compelling attendance of witnesses and production of papers.
- § 1366. Immunity from prosecution for testimony except for perjury therein.
- § 1367. Compelling witnesses to appear before commerce Commission.
- § 1368. Existing laws as to evidence and witnesses apply under act of 1906.
- § 1369. Attorney General to sue for rebate penalties.
- § 1370. Forfeitures to United States, recovery and venue.
- § 1371. —duty of district attorneys—special counsel—costs.

§ 1345. Procedure in suits for violation of anti-trust acts of 1890-1894.

Such proceedings [i. e., proceedings in equity to prevent or restrain violations of the anti-trust act of 1890] may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Part of § 4, act July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3201.

There is an identical provision in § 74 of the act of 1894.¹ The omitted part of § 4, *supra*, vests jurisdiction over such proceedings in the circuit courts, and is given elsewhere.² Restraining orders and injunctions have issued pursuant to the above statute.³

§ 1346. — bringing in additional parties.

Whenever it shall appear to the court before which any proceeding under section four of this act⁵ may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Act July 2, 1890, c. 647, § 5, 26 Stat. 210, U. S. Comp. Stat. 1901, p. 3201.

The 75th section of the act of 1894⁶ is identical with the foregoing, except that it refers to § 74 instead of § 4, *supra*.

§ 1347. Expediting hearing of suits by United States under anti-trust and commerce laws—personnel of court.

In any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled "An Act to protect trade and commerce against unlawful restraints and monop-

¹Act Aug. 27, 1894, c. 349, § 74, 31; *Nelson v. United States*, 201 U. S. 28 Stat. 570, U. S. Comp. Stat. 1901, S. 92, 50 L. ed. 673, 26 Sup. Ct. p. 3203.

²*Ante*, § 142.

³*Ante*, § 1345.

⁴*United States v. Agler*, 62 Fed. 824; *United States v. Elliott*, 64 Fed.

⁵*Ante*, § 1345.

⁶Act Aug. 27, 1894, c. 349, § 75,

olies," approved July 2, 1890, "An Act to regulate commerce," approved Feb. 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

1 act Feb. 11, 1903, c. 544, 32 Stat. 823, U. S. Comp. Stat. 1905, p. 622.

The second section of the act of 1903 provides for direct appeals to the Supreme Court.⁷

§ 1348. Election of person aggrieved by carrier to complain to commission or sue.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act [i. e., engaged in interstate commerce, etc.] may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

1901, p. 3159.

Part of § 9, act Feb. 4, 1887, c. 104, 24 Stat. 382, U. S. Comp. Stat.

A provision regarding the venue of suits under the interstate commerce law is contained in a preceding chapter.⁸ While the act of 1887 was amend-

28 Stat. 570, U. S. Comp. Stat. 1901, p. 3203.

⁷Ante, § 62.

⁸Ante, § 432, et seq.

ed in 1906, as respects §§ 1, 6, 14, 15 and 16, the above section was not changed.⁹

§ 1349. Proceedings against carrier failing to obey Commission's award of damages—venue, etc.

If, after hearing on a complaint made as provided in section thirteen of this Act [i. e., before the Commission], the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof—the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Part of § 16, act Feb. 4, 1887, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 590.

The act of 1906 amended § 16 so as to differentiate proceedings to enforce an award of damages or for money, and other awards. The statute applies to an award against railroad receivers, as against the railroad corporation itself.¹⁰ Prior to 1906 jurisdiction in the court to inquire into money awards was denied.¹¹

§ 1350. — time for filing claim and bringing suit.

All complaints for the recovery of damages shall be filed with

⁹Act June 29, 1906, c. 3591, 34 Stat. 584.

¹⁰Farmers, etc. Trust Co. v. Northern Pacific Ry. 83 Fed. 249.

¹¹Interstate Com. Com. v. Western.

etc. Ry. 82 Fed. 195; Farmers, etc. Co. v. Northern Pac. Ry. 83 Fed. 249; Interstate Com. Com. v. East Tenn. etc. Ry. 85 Fed. 107.

the Commission within two years from the time of the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: Provided, That claims accrued prior to the passage of this Act may be presented with one year.

Part of § 16, act February 4, 1887, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 590.¹³

§ 1351. — parties—joint action—service of process.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carrier parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office.

Next succeeding part of § 16, act February 4, 1887, as amended June 29, 1906, c. 3591, 34 Stat. 590.

§ 1352. — recovery.

In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Next succeeding part of § 16, act February 4, 1887, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 591.

§ 1353. Proceedings on violation of order other than for damages—petition, service, etc.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such

¹³This immediately follows the portion of § 16 in § 1349 ante.

order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition.

Part of § 16 of act February 4, 1887, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 591.

Prior to the amendment of 1906, it was held in construing the foregoing section that the power conferred on the court by the above section was strictly special and that the court could only grant or refuse compulsory obedience to the order of the commission without power to modify or change it.¹⁶ Hence in proceedings to enforce an order of the commission substitution of a modified order for that made by the commission has been refused.¹⁷ But if the order is in itself a proper one it is immaterial that the wrong reason was assigned therefor by the commission.¹⁸ It was settled under the old law that the court is not the mere executioner of the orders of the commission, the suit being an original and independent proceeding.¹⁹

§ 1354. — injunction or other process against offending carrier.

If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

Part of § 16, act February 4, 1887, c. 106, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 591.

The above portion of the section immediately follows that given in the

¹⁶Detroit, etc. Ry. v. Interstate Commerce Commission, 74 Fed. 803, 21 C. C. A. 103, reversing Interstate, etc. Commission v. Detroit, etc. Ry. 57 Fed. 1005.

¹⁷See also Texas, etc. Ry. v. Interstate, etc. Commission, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. Rep. 666.

¹⁸Interstate, etc. Commission v. Delaware, etc. Ry. 64 Fed. 723; Southern P. Co. v. Inter Com. Com. 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330.

¹⁹Kentucky, etc. Co. v. Louisville, etc. Ry. 37 Fed. 613, 2 L.R.A. 289; Interstate, etc. Commission v. Atchi-

preceding code section. Previous to the amendment of 1906 the provision was that "it shall be lawful" to issue writ of injunction etc., and attachment against a disobeying carrier, its officers, etc., was authorized.¹

It was held that a preliminary injunction to compel a carrier to obey an order of the Commission would be denied when the answer denied the unreasonableness of the defendant's charges.² It is proper to enjoin a carrier found guilty, from the repetition of specified acts of violation, but not to enjoin it in general terms from violating the statute.³

§ 1355. — appeal—priority of hearing—not a supersedeas.

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

Next succeeding part of § 16, act February 4, 1887, c. 104, 24 Stat. 384, as amended June 29, 1906, c. 3591, 34 Stat. 592.

The above provision and others regarding appeal are also given in an earlier chapter.⁵ As enacted in 1887 and amended in 1889 this portion of § 16 was superseded by the circuit court of appeals act of 1891, by which such cases went to the circuit court of appeals.⁶ On an appeal to the circuit court of appeals the decree of the circuit court was not superseded; but on appeal to the Supreme Court from the circuit court of appeals, the latter decree was, so that the decree of the circuit court remained in force in any event.⁷

§ 1356. Suits against Commission—venue—expediting hearing—appeals and priority—interlocutory injunction and appeal.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if

son, etc. Ry. 50 Fed. 295; Interstate, etc. Commission v. Lehigh, etc. Ry. 49 Fed. 177.

¹See U. S. Comp. Stat. 1901, p. 3165.

²Shinkle, etc. Co. v. Louisville, etc. Ry. 62 Fed. 690; Interstate, etc. Commission v. Lehigh, etc. R. Co. 49 Fed. 177.

³New York, etc. R. R. v. Inter.

Com. Com. 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

⁵Ante, §§ 60, 62, 63.

⁶Interstate Commerce Commission v. Atchison, etc. Ry. 149 U. S. 264, 37 L. ed. 727, 13 Sup. Ct. Rep. 837. See ante, § 42.

⁷Louisville, etc. R. Co. v. Behlmer, 169 U. S. 644, 42 L. ed. 889, 18 Sup. Rep. 502.

the order or requirement has been made against two or more carriers, then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved Feb. 11, 1903,⁸ shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce approved Feb. 4, 1887, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney General in every such case to file the certificate provided for in said expediting act of Feb. 11, 1903, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States,⁹ the case shall have in such court priority in hearing and determination over all other causes except criminal causes: Provided, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided further, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

Next succeeding part of § 16, of act February 4, 1887, 24 Stat. 376, as amended by § 5, act June 29, 1906, c. 3591, 34 Stat. 592.

Portions of the foregoing section are also given elsewhere.¹⁰ The expediting act of 1903 prescribed procedure in the trial court¹¹ and also on appeal.¹²

⁸Ante, §§ 1347, 42, 43.

⁹Ante, §§ 42, 43.

¹⁰Ante, §§ 64, post, § 2043.

¹¹Ante, § 1347.

¹²Ante, § 42, 43.

§ 1357. Copies of papers, schedules and reports filed with commission as evidence.

The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

Part of § 16, act February 4, 1887, 24 Stat. 376, as amended act June 29, 1906, c. 3591, 34 Stat. 592.

This is the concluding portion of § 16 of the act as amended in 1906 and immediately follows that given in the preceding section.

§ 1358. Mandamus to compel obedience to commerce acts.

The circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them.

Part of § 20, of act February 4, 1887, 24 Stat. 386, as amended June 29, 1906, c. 3591, 34 Stat. 594.

Mandamus will not lie under this provision to compel a carrier to perform a duty arising under contract.¹⁴

§ 1359. Proceedings in equity by Commission against carrier discriminating in rates, etc.—petition and hearing.

Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in

¹⁴United States v. Norfolk, etc. R.
R. 138 Fed. 849.

the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary.

First part of § 3, act February 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 600.

Other portions of § 3 are contained in the next section of this Code. The act of 1903 was amended in 1906 by providing a penalty for rebating forfeitable to the United States and recoverable in suit by the Attorney General.¹⁵ Prior to the above mentioned act of 1903 the Federal courts had no jurisdiction over equity suits by the Attorney General, to enjoin rebating.¹⁶

§ 1360. — process against such carrier to enforce published rates.

Upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law.

Part of § 3, act February 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 601.

§ 1361. — suits by injured party for damages, not precluded.

The proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February 4,

¹⁵Post, § 1369.

¹⁶United States v. Atchison, etc.
Ry. 142 Fed. 176.

1887, entitled "An act to regulate commerce" and the acts amendatory thereof.

Part of § 3, act February 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 601.

The portion of § 3 immediately preceding the above prescribes the duties of United States district attorneys in the premises and is given in an earlier chapter.¹⁸

§ 1362. What parties may be included in commerce cases.

In any proceedings for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

§ 2 of act February 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 600.

In proceeding against a carrier to enforce an order of the commission, another carrier connected with the defendant in jointly making the forbidden rate is a proper but not a necessary party.¹⁹ An order against two carriers may be enforced against one only where the other is out of the jurisdiction.²⁰

§ 1363. Reports of accidents made to Commission not admissible evidence.

Neither said report [i. e. report of accidents required by the act] nor any part thereof shall be admitted as evidence or used for any purpose against such railroad so making such report in any suit or action for damages growing out of any matter mentioned in said report.

Act March 3, 1901, c. 866, § 3, 31 Stat. 1446, U. S. Comp. Stat. 1901, p. 3176.

¹⁸Ante, § 539.

²⁰Interstate, etc. Commission v.

¹⁹Texas, etc. Ry. v. Interstate, etc. Texas, etc. Ry. 57 Fed. 948, 6 C. C. Commission, 162 U. S. 197, 40 L. ed. A. 653.
940, 16 Sup. Ct. Rep. 666.

§ 1364. No person excused from testifying because of possible incrimination.

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, "An act to regulate commerce," approved February 4, 1887, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Act February 11, 1893, c. 63, 27 Stat. 443, U. S. Comp. Stat. 1901, p. 3173.

The above is included because covering proceedings in court as well as before the Commission itself. It superseded the earlier provisions of § 12 of the act of 1887 as amended in 1889.

§ 1365. Compelling attendance of witnesses and production of papers.

In proceedings under this act [for violating published rates as given in preceding sections³] and the acts to regulate commerce the said courts shall have the power to compel the attendance of

witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce, against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted, approved February 11, 1903," shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

Part of § 3, act February 19, 1903, c. 708, 32 Stat. 848, U. S. Comp. Stat. 1905, p. 601.

Other portions of § 3 are given in preceding sections of this Code.⁴ A circuit court order directing a witness to answer in proceedings under the anti-trust act of 1890 is not final or appealable.⁵

§ 1366. Immunity from prosecution for testimony except for perjury therein.

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts [i. e. the commerce acts of 1887, 1889, etc., and the anti-trust acts of 1890 and 1894]: Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

Part of § 1, act February 25, 1903, c. 755, 32 Stat. 904, U. S. Comp. Stat. 1905, p. 602.

³Ante, §§ 1359-1361.

⁴Ante, §§ 1359-1361.

⁵Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356.

The above was a proviso attached to an appropriation to defray the expense of suits under the commerce laws.

§ 1367. Compelling witness to appear before Commerce Commission.

Any of the circuit courts of the United States within the jurisdiction of which such inquiry [i. e. an inquiry by the Interstate Commerce Commission into the management of the business of a common carrier] is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Part of § 12, act February 4, 1887, c. 104, 24 Stat. 383, U. S. Comp. Stat. 1901, p. 3162.

The commissioner of corporations is given the same right to subpoena and examine witness in certain cases as is conferred by the above law on the Interstate Commerce Commission.⁷

§ 1368. Existing laws as to evidence and witnesses apply under act of 1906.

All existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the act to regulate commerce and all acts amendatory thereof shall apply to any and all proceedings and hearings under this act.

§ 9 of act June 29, 1906, c. 3591, 34 Stat. 595.

§ 1369. Attorney-General to sue for rebate penalties.

Any person, corporation or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by

⁷Act Feb. 14, 1903, c. 552, § 6, 32 Stat. 827, U. S. Comp. Stat. 1905, p. 68.

or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other consideration so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Part of § 1, act February 19, 1903, 32 Stat. 547, as amended June 29, 1906, c. 3591, 34 Stat. 588, 589.

§ 1370. Forfeitures to United States, recovery and venue.

The forfeiture provided for in this act [i. e. for failure to obey Commission's orders] shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

Part of § 12, act February 4, 1887, c. 104, 24 Stat. 383, as amended June 29, 1906, c. 3591, 34 Stat. 591.

§ 1371. — Duty of district attorneys—special counsel—costs.

It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may,

with the consent of the Attorney General, employ special counsel in proceeding under this act, paying the expenses of such employment out of its own appropriation.

Part of § 16, act February 4, 1887, c. 104, 24 Stat. 384, as amended March 2, 1889, 25 Stat. 859, as amended June 29, 1906, c. 3591 34 Stat. 591.

CHAPTER 43.

SUITS BY AND ON BEHALF OF UNITED STATES.

- § 1380. Procedure in government condemnation suits.
- § 1381. Injunction to enforce removal of obstructions to navigable waters.
- § 1382. Suits for unlawful enclosure of public lands.
- § 1383. Suits for duties, taxes, penalties etc., to be in name of United States.
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- § 1391. Suits for penalties under alien immigrant law not to be compromised without court's consent.
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- § 1419. Continuances in internal revenue suits.
- § 1420. Suits on Federal building contractor's bond.—intervenor.
- § 1421. —right of contractors to sue in name of United States.
- § 1422. —time when creditors must sue.
- § 1423. —all creditors in one suit—pro rata payment—discharge of surety.
- § 1424. —creditors to have actual and published notice of suit.

§ 1380. Procedure in government condemnation suits.

The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of this act [an act to authorize the condemnation of land for sites for public buildings, etc.] shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

§ 2 of act August 1, 1888, c. 728. 25 Stat. 357, U. S. Comp. Stat. 1901, p. 2517.

The phraseology of the above section is similar to that used in the general provision conforming Federal procedure in cases at law to that obtaining in the courts of the various States.¹

§ 1381. Injunction to enforce removal of obstructions to navigable waters.

The removal of any structures or parts of structures erected in violation of the provisions [forbidding bridges, dams, dikes, etc., upon navigable waters except upon plans approved by the War Department] of the said sections [i. e., sections nine, ten and eleven of the act] may be enforced by the injunction of any circuit court ex-

¹Ante, § 900.

exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Part of § 12, act March 3, 1899, c. 425, 30 Stat. 1151, as amended February 20, 1900, c. 23, § 2, 31 Stat. 32, U. S. Comp. Stat. 1901, p. 3542.

§ 1382. Suits for unlawful enclosure of public lands.

Where the alleged unlawful inclosure [of public lands] includes less than one hundred sixty acres of land, no suit shall be brought under the provisions of this act [by the United States district attorney for the destruction of such enclosure] without authority from the Secretary of the Interior.

§ 6, of act February 25, 1885, c. 149, 23 Stat. 322, U. S. Comp. Stat. 1901, p. 1526.

The act makes it the district attorney's duty to sue in such cases.³

§ 1383. Suits for duties, taxes, penalties, etc., to be in name of United States.

All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States.

R. S. § 919, U. S. Comp. Stat. 1901, p. 685.

The correct practice is to bring suit in the name of the United States when they are the real parties in interest,⁵ although information filed in the name of the district attorney, where the United States was a real party plaintiff, has been held valid.⁶ So also proceedings to condemn vessel as prize have been brought in the name of the captor;⁷ and the law permits anyone to sue for recovery of the penalty imposed for overcrowding a vessel.⁸ It has been held, however, that the Attorney General has no power to maintain suit in his own name to repeal letters patent for an invention.⁹ As is elsewhere shown, in equity cases the United States proceeds by bill rather than by the English method of information.¹⁰

³Ante, § 534.

⁵Benton v. Woolsey, 12 Pet. 30, 9 L. ed. 987.

⁶Benton v. Woolsey, 12 Pet. 30, 9 L. ed. 987.

⁷Jecker v. Montgomery, 18 How. 125, 15 L. ed. 317.

⁸R. S. §§ 4465 and 4469, U. S. Comp. Stat. 1901, p. 3046, 3048. See also Hatch v. Steamboat Boston, 3 Fed. 807.

⁹Attorney General v. Rumford Works, 32 Fed. 608.

¹⁰Ante, § 944.[a]

§ 1384. Consolidation of suits for revenue seizures.

Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them.

R. S. § 920, U. S. Comp. Stat. 1901, p. 685.

The above provision was first enacted in 1853.¹²

§ 1385. Notice of libel for seizure under revenue laws and judgment thereon.

When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares or merchandise, and gives bond to defend the prosecution thereof and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law.

R. S. § 923, U. S. Comp. Stat. 1901, p. 986.

§ 1386. Property taken under revenue laws irrepleviable.

All property taken or detained by any officer or other person, under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders, and decrees of the courts of the United States having jurisdiction thereof.

R. S. § 934, U. S. Comp. Stat. 1901, p. 689.

The general rules as to property in custodia legis are discussed elsewhere.¹⁴

¹²Act Feb. 26, 1853, c. 80, § 1,
10 Stat. 162.

¹⁴Ante, § 17.

§ 1387. — sale of condemned vessels, goods, etc.

All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as heretofore directed.

R. S. § 939, U. S. Comp. Stat. 1901, p. 691.

The sale of perishable prize property is provided by another section.¹⁵

§ 1388. Judgment against delinquent officer accountable for public money—continuance, when granted.

When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term

¹⁵Ante, § 1322.

may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads non est factum, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided.

R. S. § 957, U. S. Comp. Stat. 1901, p. 698.

The above section is carried forward into the Revised Statutes from an act of 1797.¹⁷

§ 1389. Compromise of cases under revenue laws.

The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the commissioner the opinion of the solicitor of internal revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

R. S. § 3229, U. S. Comp. Stat. 1901, p. 2089.

§ 1390. Discontinuance or nol. pros. in cases of illicit distilling, only by permission.

No discontinuance or nolle prosequi of any prosecution under section three thousand two hundred and fifty-seven [punishing illicit distilling] shall be allowed without the permission in writing of the Secretary of the Treasury and the Attorney General.

R. S. 3230, U. S. Comp. Stat. 1901, p. 2090.

The above section was carried forward into the Revised Statutes from an act of 1868.¹⁹ Continuances in internal revenue suits and criminal proceedings generally are permitted by another section.²⁰

¹⁷Act March 3, 1797, c. 20, § 3, 1 Stat. 514.

¹⁹Act March 31, 1868, c. 41, § 7, 15 Stat. 60.

²⁰See post, §§ 1419, 1596.

§ 1391. Suits for penalties under alien immigrant law not to be compromised without court's consent.

No suit or proceeding for violations of said act of February 26, 1885, prohibiting the importation and migration of foreigners under contract or agreement to perform labor, shall be settled, compromised, or discontinued without the consent of the court, entered of record, with reasons therefor.

§ 2 of act March 3, 1891, c. 551, 26 Stat. 1084, U. S. Comp. Stat. 1901, p. 1295.

§ 1392. Recovery of penalties and forfeitures under navigation laws.

All the penalties and forfeitures which may be incurred for offenses against this title [i. e. Title 48, respecting commerce and navigation] may be sued for, prosecuted and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed.

R. S. § 4305, U. S. Comp. Stat. 1901, p. 2954.

The above section was originally enacted in 1792.²

§ 1393. Bailing of property seized under customs laws.

Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisalment shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisalment, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer there-

²Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298.

of, if any there be, that the duties on the goods, wares and merchandise, or tonnage-duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay.

R. S. § 938, U. S. Comp. Stat. 1901, p. 690.

§ 1394. Judgment on debentures for customs duties—continuances, when granted.

In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collections of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted.

R. S. § 959, U. S. Comp. Stat. 1901, p. 699.

The above section was originally enacted in 1799.³

§ 1395. — on bonds for customs duties—continuances.

When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term, whereupon a continuance may be granted until the next term, and no longer,

³Act March 2, 1799, c. 22, § 80, 1 Stat. 688.

if the court is satisfied that such continuance is necessary for the attainment of justice.

R. S. § 960, U. S. Comp. Stat. 1901, p. 699.

The above section was originally enacted in 1799.⁵ Where there is a real defense an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given.⁶

§ 1396. — form of judgment and execution thereon.

In all suits by the United States for the recovery of duties upon imports, or of penalties for the nonpayment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution.

R. S. § 962, U. S. Comp. Stat. 1901, p. 699.

The above section was originally enacted in 1865.⁸ A similar provision is set forth in R. S. § 3014.⁹ A judgment originally payable in gold may be amended during the term by the insertion of the words "and silver."¹⁰

§ 1397. Interest on bonds for duties.

Upon all bonds on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due.

R. S. § 963, U. S. Comp. Stat. 1901, p. 700.

The above section was carried forward into the Revised Statutes from an act of 1799.¹²

§ 1398. Interest on debentures for customs duties.

In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed,

⁵Act March 2, 1799, c. 22, § 65, 1 Stat. 676.

⁶United States v. Phelps, 8 Pet. 700, 8 L. ed. 1094.

⁸Act March, 3, 1865, c. 80, § 12, Stat. 676.
¹³Stat. 494.

⁹U. S. Comp. Stat. 1901, p. 1988.

¹⁰Cheang-Kee v. United States, 3 Wall. 320, 18 L. ed. 72.

¹²Act March 2, 1799, c. 22, § 65, 1

at the rate of six per centum per annum, from the time when such debenture became due and payable.

R. S. § 965, U. S. Comp. Stat. 1901, p. 700.

The above section was carried forward into the Revised Statutes from an act of 1799.¹³

§ 1399. Postal suits—when attachment may issue—where defendant has removed property.

In all cases where debts are due from defaulting or delinquent postmaster, contractors, or other officers, agents or employees of the Postoffice Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases: First. When such officer, agent or employee, and his sureties, or either of them, is a nonresident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process. Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about to convey away his property, or any part thereof, or has removed, or is about to remove, the same, or any part thereof, from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof.

R. S. § 924, U. S. Comp. Stat. 1901, p. 686.

The above section was carried forward into the Revised Statutes from an act of 1865.¹⁵

§ 1400. — by whom application for attachment made—affidavit.
Application for such warrant of attachment [i. e. in postal suits]

¹³Act March 2, 1799, c. 22, § 80,
1 Stat. 687.

¹⁵Act Feb. 23, 1865, c. 47, § 1, 3
Stat. 432.

may be made by any district or assistant district attorney, or by any other person authorized by the Postmaster General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt.

R. S. § 925, U. S. Comp. Stat. 1901, p. 687.

The above section was originally enacted in 1865.¹⁶ The court may allow an amendment to a defective affidavit for attachment although not permitted by the State law.¹⁷

§ 1401. — issuance and execution of attachment.

Upon any such application, [i. e. for attachment in postal suits] and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.

R. S. § 926, U. S. Comp. Stat. 1901, p. 687.

The above section was originally enacted in 1865.²⁰ This section does not apply to a suit by a private individual.¹

§ 1402. — trial of issue as to ownership of attached property— other remedies.

At any time within twenty days before the return day of such warrant, [i. e. for attachment in postal suits] the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties

¹⁶Act Feb. 23, 1865, c. 47, § 2, 13 Stat. 433.

²⁰Act Feb. 26, 1865, c. 47, § 2, 13 Stat. 433.

¹⁷Erstein v. Rothschild, 22 Fed. 66. See ante, § 813.

¹Hatch v. The Boston, 3 Fed. 807.

may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached, and a specific return thereof, shall be confined to the remedy herein afforded; but his right to an action of trespass, or other action for damages, shall not be impaired hereby.

R. S. § 927, U. S. Comp. Stat. 1901, p. 687.

The above section was carried forward into the Revised Statutes from an act of 1865.³

§ 1403. — proceeds and accretions—how invested.

When the property attached [i. e. in postal suits] is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same.

R. S. § 928, U. S. Comp. Stat. 1901, p. 688.

The above section was originally enacted in 1865.⁴

§ 1404. — publication of attachment, when and how made.

Immediately upon the execution of any such warrant of attachment, [i. e. in postal suits] the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months, and of nonresidents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued.

R. S. § 929, U. S. Comp. Stat. 1901, p. 688.

The above section was originally enacted in 1865.⁶

§ 1405. — persons having property of defendant to account—sales void—personal notice.

After the first publication of such notice of attachment [i. e. in postal suits] as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such

³Act Feb. 23, 1865, c. 47, § 3, 13 Stat. 433.

⁶Act Feb. 23, 1865, c. 47, § 4, 13 Stat. 433.

⁴See act Feb. 23, 1865, c. 47, § 4, 13 Stat. 433.

property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment.

R. S. § 930, U. S. Comp. Stat. 1901, p. 688.

The above section was carried forward into the Revised Statutes from an act of 1865.⁷

§ 1406. — defendant discharged from attachment on giving bond.

Upon application of the party whose property has been attached, [i. e. in postal suits] the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises.

R. S. § 931, U. S. Comp. Stat. 1901, p. 688.

§ 1407. — foregoing proceedings not to abridge existing rights of United States.

Nothing contained in the preceding eight sections⁷ shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts.

R. S. § 932, U. S. Comp. Stat. 1901, p. 689.

The above section was originally enacted in 1865.⁸

§ 1408. — credits, when allowed.

No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the Postoffice Department, unless the same has been presented to the sixth auditor, and by him disallowed, in

⁷Act Feb. 23, 1865, c. 47, § 6, 13 Stat. 434.

⁸Ante, §§ 1399, 1406.

⁸Act Feb. 23, 1865, c. 47, § 9, 13 Stat. 434.

whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident.

R. S. § 952, U. S. Comp. Stat. 1901, p. 695.

The above section was originally enacted in 1836.⁹ Unless the conditions have been complied with or the case is within the exceptions, the credits cannot be pleaded by way of set off.¹⁰

§ 1409. — judgment—right to continuance.

In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Postoffice Department, which has been submitted to and disallowed by the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.

R. S. § 958, U. S. Comp. Stat. 1901, p. 698.

The above section was carried forward into the Revised Statutes from an act of 1836.¹¹

§ 1410. — interest on balances due Postoffice Department.

In all suits for balances due to the Postoffice Department, interest thereon shall be recovered, from the time of the default, at the rate of six per centum a year.

R. S. § 964, U. S. Comp. Stat. 1901, p. 700.

The above section was originally enacted in 1836.¹²

§ 1411. When defendant sued by United States may claim credits.

In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as

⁹Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

¹⁰Ware v. United States, 4 Wall.

617, 18 L. ed. 389; United States v. Davis, Deady, 294, Fed. Cas. No. 14,927.

¹¹Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

¹²Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

R. S. § 951, U. S. Comp. Stat. 1901, p. 695.

The above section was originally enacted in 1797.¹⁴ It embraces every suit between the United States and an individual.¹⁵ No State law can affect the question of set-off in such an action.¹⁶ Where the set-off is in excess of the claim, judgment cannot be rendered against the United States for the excess.¹⁷ When the claim has been presented to the proper officers and has been disallowed it may be given in evidence and allowed as a set-off;¹⁸ even though not presented and disallowed until after commencement of the suit.¹⁹ Where a claim has not been presented and disallowed no evidence can be given concerning it,²⁰ unless the defendant has vouchers which he could not procure before.¹ Proof of a claim is not ad-

¹⁴Act March 3, 1797, c. 20, § 3, 1 Stat. 514.

¹⁵United States v. Ingersoll, Crabbe, 135, Fed. Cas. No. 15,440; United States v. Barker, 1 Paine, 156, Fed. Cas. No. 14,517.

¹⁶United States v. Robeson, 9 Pet. 319, 9 L. ed. 142; Reeside v. Walker, 11 How. 272, 13 L. ed. 693; United States v. Eckford, 6 Wall. 484, 18 L. ed. 920; Watkins v. United States, 9 Wall. 759, 19 L. ed. 822. See also, United States v. Prentice, 6 McLean, 67, Fed. Cas. No. 16,083.

¹⁷Reeside v. Walker, 11 How. 280, 13 L. ed. 693; United States v. Eckford, 6 Wall. 484, 18 L. ed. 920; Case v. Terrell, 11 Wall. 201, 20 L. ed. 134; Schaumburg v. United States, 103 U. S. 667, 26 L. ed. 599; Carlisle v. Cooper, 64 Fed. 474, 12 C. C. A. 235; Bowker v. United States, 105 Fed. 398.

¹⁸United States v. Kimball, 101 U. S. 726, 25 L. ed. 830; United States v. Giles, 9 Cranch, 212, 3 L. ed. 708; United States v. Ringgold, 8 Pet. 150, 8 L. ed. 809; United States v. McDaniel, 7 Pet. 1, 8 L. ed. 587; United States v. North American, etc. Co. v. Wade, 75 Fed. 261.

74 Fed. 145; United States v. Smith, 1 Bond, 68, Fed. Cas. No. 16,321; United States v. Corwin, 1 Bond, 149, Fed. Cas. No. 14,870.

¹⁹United States v. Hawkins, 10 Pet. 125, 9 L. ed. 369; United States v. Collier, 3 Blatchf. 325, Fed. Cas. No. 14,833.

²⁰Railroad Co. v. United States, 101 U. S. 543, 25 L. ed. 1068; Kings County Savings Inst. v. Blair, 110 U. S. 206, 29 L. ed. 659, 6 Sup. Ct. Rep. 353; Watkins v. United States, 9 Wall. 759, 19 L. ed. 822; United States v. Austin, 2 Cliff. 325, Fed. Cas. No. 14,480; United States v. Ingersoll, Crabbe, 135, Fed. Cas. No. 15,440; United States v. Smith, 1 Bond, 68, Fed. Cas. No. 16,321; United States v. Duval, Gilp. 356, Fed. Cas. No. 15,015; United States v. Barker, 1 Paine, 156, Fed. Cas. No. 14,517.

¹Halliburton v. United States, 13 Wall. 63, 20 L. ed. 533; United States v. Giles, 9 Cranch, 212, 3 L. ed. 708; United States v. Patterson, 91 Fed. 856; Yates v. United States, 90 Fed. 59, 32 C. C. A. 507; United States

missible until a proper foundation is laid by proof of its rejection.² No particular form of allowance or disallowance is required.³

§ 1412. Suits by United States against corporations—corporation's debtors summoned as garnishees.

In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States; provided, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, or until the sum in which the garnishee stands indebted is actually due.

R. S. § 935, U. S. Comp. Stat. 1901, p. 689.

The above section was carried forward into the Revised Statutes from an act of 1818.⁵

§ 1413. — issue tendered when garnishee denies indebtedness.

When any person summoned as garnishee [i. e. in a suit by United States against a corporation] deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

R. S. § 936, U. S. Comp. Stat. 1901, p. 690.

The above section was originally enacted in 1818.⁶

§ 1414. — garnishee failing to appear.

If any person summoned as garnishee, as aforesaid, fails to ap-

²United States v. Gilmore, 7 Wall. 491, 19 L. ed. 282.

³United States v. Duval, Gilp. 356, Fed. Cas. No. 15,015.

⁵Act April 20, 1818, c. 83, § 8, 3 Stat. 443.

⁶Act April 20, 1818, c. 83, § 9, 3 Stat. 443.

pear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

R. S. § 937, U. S. Comp. Stat. 1901, p. 690.

The above section was originally enacted in 1818.⁷

§ 1415. Liability of United States to costs in revenue suits.

When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit. ●

R. S. § 969, U. S. Comp. Stat. 1901, p. 702.

The above section was originally enacted in 1866.⁸ The existing law as to costs generally is contained in a subsequent chapter.⁹

§ 1416. Payment of costs by defendant prosecuted for fine or forfeiture.

When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution.

R. S. § 974, U. S. Comp. Stat. 1901, p. 703.

This provision was taken from an act of 1792.¹¹

§ 1417. Execution in favor of United States to run in every State.

All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State, or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

R. S. § 986, U. S. Comp. Stat. 1901, p. 707.

The above section was carried forward into the Revised Statutes from

⁷Act April 20, 1818, c. 83, § 10, 3 Stat. 444.

⁹Post, § 1823 et seq.

¹¹Act May 8, 1792, c. 36, 1 Stat.

⁸Act July 30, 1866, c. 184, § 9, 277.

14 Stat. 111.

an act of 1797.¹³ Execution in favor of the United States may be served in any part of the United States.¹⁴

§ 1418. Remission of fines, penalties and forfeitures.

The Secretary of the Treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them, to remit the fine, penalty, or forfeiture, if in his opinion it was incurred without willful negligence or fraud, in either of the following cases: First. If the fine, penalty, or forfeiture was imposed under authority of any revenue law, and the amount does not exceed one thousand dollars. Second. Where the case occurred within either of the collection districts in the States of California or Oregon. Third. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law relating to the importation of merchandise from foreign contiguous territory, or relating to manifests for vessels enrolled or licensed to carry on the coasting trade on the northern, northeastern, and northwestern frontiers. Fourth. Repealed. Fifth. If the fine, penalty, or forfeiture was imposed by authority of any provisions of law for levying or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the case arose within the collection district of Alaska, or was imposed by virtue of any provisions of law relating to fur seals upon the islands of Saint Paul and Saint George.

R. S. § 5293, U. S. Comp. Stat. 1901, p. 3605.

1419. Continuances in internal revenue suits.

It shall be lawful for any court in which any suit . . .¹⁵ arising under the internal revenue laws may be pending, to continue the same at any stage thereof, for good cause shown on motion by the district attorney.

R. S. § 3231, U. S. Comp. Stat. 1901, p. 2090.

Dismissal or nol. pros. in prosecutions for illicit distilling is forbidden by another provision.¹⁷

¹³Act March 3, 1797, c. 20, § 6,
1 Stat. 515.

¹⁴Toland v. Sprague, 12 Pet. 328,
9 L. ed. 1093.

¹⁵"Or criminal proceeding." See
post, § 1596.

¹⁷Ante, § 1390.

§ 1420. Suits on Federal building contractor's bond—interveners.

Hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.

First part of act August 13, 1894, as amended by act February 24, 1905, c. 778, 33 Stat. 811, U. S. Comp. Stat. 1905, p. 493.

§ 1421. — right of contractors to sue in name of United States.

If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and

his sureties, and to prosecute the same to final judgment and execution.

Next succeeding part of August 13, 1894, as amended by act February 24, 1905, c. 778, 33 Stat. 811, U. S. Comp. Stat. 1905, p. 493.

§ 1422. — time when creditors must sue.

Where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later.

Proviso following preceding portion of act August 13, 1894, as amended February 24, 1905, c. 778, 33 Stat. 811, U. S. Comp. Stat. 1905, p. 494.

§ 1423. — all creditors in one suit—pro rata payment—discharge of surety.

Where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability.

Proviso following preceding portion of act, August 13, 1894, as amended February 24, 1905, c. 778, 33 Stat. 811, U. S. Comp. Stat. 1905, p. 494.

§ 1424. — creditors to have actual and published notice of suit.

In all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

Concluding proviso of act August 13, 1894, as amended February 24, 1905, c. 778, 33 Stat. 811, U. S. Comp. Stat. 1905, p. 494.

CHAPTER 44.

PROCEDURE IN SUITS AGAINST UNITED STATES.

- § 1440. Partition proceedings where United States are parties—bill and service.
- § 1441. —appearance and pleading on behalf of United States.
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- § 1498. —lists of judgments sent to Congress and paid.
- § 1499. —assignment of claims void—attorney fees.
- § 1500. —appeals—mode of procedure.
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- § 1502. —assistant Attorney General to be appointed.
- § 1503. Procedure on various kinds of claims.
- § 1504. Payment of judgments and awards through department auditors.

**§ 1440. Partition proceedings where United States are parties
—bill and service.**

When such suit [i. e. a suit for partition¹] is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the Attorney General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter.

¹See ante, § 141.

First part of § 2, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

The remainder of § 2 of the act is contained in the next two sections of this Code.

§ 1441. — appearance and pleading on behalf of United States.

It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons.

Second part of § 2, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

§ 1442. — sale and purchase by United States.

Whenever in such suit the court shall order a sale of the property or any part thereof the Attorney General of the United States may, in his discretion, bid for the same in behalf of the United States. If the United States shall be the purchaser, the amount of the purchase money shall be paid from the Treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney General.

Concluding part of § 2, act May 17, 1898, c. 339, 30 Stat. 416, U. S. Comp. Stat. 1901, p. 516.

The other parts of § 2 of the above act are contained in the two sections of this Code immediately preceding.

§ 1443. Customs cases—procedure on appeal from general appraisers—return of evidence.

Such application [i. e. application to the circuit court by an importer dissatisfied with the board of general appraisers' decision as to liability for duties] shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or

agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

The preceding portion of § 15 gives the right of appeal to the circuit court.⁴ Other portions are given in next following sections of this Code.⁵

§ 1444. — taking of additional evidence.

Within twenty days after the aforesaid return [as provided in the preceding section⁶] is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

§ 1445. — court to decide from record—priority.

Such further evidence with the aforesaid returns [mentioned in the preceding sections⁷] shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

The above immediately follows that portion of § 15 given in the preceding section of this Code.⁸

§ 1446. — court's decision final—review.

The decision of such court [i. e. the circuit court having juris-

⁴Ante, § 140.

⁵Post, §§ 1444-1447.

⁶Ante, § 1443.

⁷Ante, §§ 1443, 1444.

⁸Ante, § 1444.

diction⁹] shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly. Unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision may, within thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney General shall apply for it within thirty days after the rendition of such decision. On such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

The above immediately follows that portion of § 15 given in the preceding section of this Code.¹⁰

§ 1447. — satisfaction of judgment—circuit court may establish rules.

All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section twenty-three of this act. . . .¹¹ Said circuit courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

§ 1448. Court of Claims—procedure in general.

Only statutory provisions respecting procedure in the Court of Claims are included in this Code. The Court of Claims has very elaborate rules governing various details of its practice, pleading and procedure, which, it is conceived, are too strictly local in char-

⁹See ante, § 140.

¹⁰Ante, § 1445.

¹¹Requires circuit courts to be always open. See ante, § 367.

acter and operation for inclusion herein. However, the rules are given seriatim in an appendix.

Author's section.

§ 1449.—set-off or counterclaim of government allowed.

Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the government, against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case, it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district or circuit court shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced.

R. S. § 1061, U. S. Comp. Stat. 1901, p. 737.

The above section was originally enacted in 1863.¹³ Where indefinite evidence of the counterclaim is given it may be used to defeat it, but judgment will not be entered against the claimant.¹⁴

§ 1450. — or may be deducted in paying judgment.

When any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment, or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim as in his opinion, will be suffi-

¹³Act March 3, 1863, c. 92, § 3, 12 Stat. 765.

¹⁴Shrewsbury v. United States, 13 Ct. Cl. 183.

cient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary, with six per cent interest thereon for the time it has been withheld from the plaintiff.

Act March 3, 1875, c. 149, 18 Stat. 481, U. S. Comp. Stat. 1901, p. 746.

If the claimant consents that the debt be paid off, accepts the balance and discharges the judgment, he thereby waives his right to test its validity by legal proceedings.¹⁵

§ 1451. — decree that disbursing officer's loss was without fault entitles him to credit on his account.

Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts.

R. S. § 1962, U. S. Comp. Stat. 1901, p. 737.

§ 1452. — procedure in cases transmitted by executive departments.

All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section,¹⁷ shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.

R. S. § 1064, U. S. Comp. Stat. 1901, p. 738.

The above section was originally enacted in 1868.¹⁸ The rules of the Court of Claims are given in an appendix. A rule of the Court of Claims

¹⁵*Bonnafin v. United States*, 14 Ct. Cl. 484.

¹⁷See ante, § 236.

¹⁸Act June 25, 1868, v. 71, § 7, 15 Stat. 176.

requiring parties to present their claims to executive department before suing in that court is unauthorized and void.¹⁹ If one only of two claimants appears he cannot take judgment by default though the government does not defend.²⁰

§ 1453. — payment of judgments in transmitted cases.

The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, [the sections referred to concern cases transmitted to Departments] shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

R. S. § 1065, U. S. Comp. Stat. 1901, p. 739.

The above section was carried forward into the Revised Statutes from an act of 1868.¹ The United States may set off debts due it from **any** claimant in whose favor judgment has been entered.²

§ 1454. — when aliens may sue in Court of Claims.

Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

R. S. § 1068, U. S. Comp. Stat. 1901, p. 740.

The above section was originally enacted in 1868.⁴ Aliens of governments contemplated in this section may prosecute claims against the United States, although such governments may reserve the right to deny the remedy in a few cases.⁵ An alien who was naturalized before this section was enacted is entitled to prosecute an action begun before he was naturalized.⁶

¹⁹Clyde v. United States, 13 Wall. 39, 20 L. ed. 479. See also, United States v. Kaufman, 96 U. S. 571, 24 L. ed. 793; United States v. Knox, 128 U. S. 234, 32 L. ed. 467, 9 Sup. Ct. Rep. 63, United States v. Fitch, 70 Fed. 579, 17 C. C. A. 233; United States v. Utz, 80 Fed. 851, 26 C. C. A. 184.

²⁰Bright v. United States, 8 Ct. Cl. 326.

¹Act June 25, 1868, c. 71, § 7, 15 Stat. 76.

²Ante, §§ 1449, 1450.

⁴Act July 18, c. 276, § 2, 15 Stat. 243.

⁵United States v. O'Keefe, 11 Wall. 178, 20 L. ed. 131; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426.

⁶Bulwinkle v. United States, 4 Ct. Cl. 395.

So also he may prosecute an action begun before the above statute was enacted if he was not an alien when the plea of alienage was put in.⁷

§ 1455. — allegations in claimant's petition—verification.

The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true.^{[a]-[c]} And the said petition shall be verified by the affidavit of the claimant, his agent, or attorney.

R. S. § 1072, U. S. Comp. Stat. 1901, p. 741.

[a] In general—amendments and intervention.

The above section was carried forward into the Revised Statutes from an act of 1863.⁸ Later statutes contain provisions requiring other allegations in the petition.⁹ Where the petition is defective in its averments it may be amended.¹⁰ But where such amendment works injustice or misleads the other party it will not be allowed.¹¹ The assignor may be substituted;¹² and a ward may be made a party on his coming of age.¹³ So also on a petition to recover rent due on installments a party may amend so as to include the entire rent.¹⁴ New parties, however, cannot be substituted by amendment when not in privity with the original ones.¹⁵ Where joint owners join they may amend so as to sever in the prayer for relief and ask for separate judgments on the merits.¹⁶ So also where two persons join and only one is entitled to the claim the petition may be

⁷Schaefer v. United States, 4 Ct. Cl. 529; Wagner v. United States, 5 Ct. Cl. 637.

⁸Act March, 3, 1863, c. 92, § 12, 12 Stat. 767.

⁹See post, this chapter.

¹⁰Jones v. United States, 1 Ct. Cl. 183.

¹¹Thomas v. United States, 15 Ct. Cl. 335.

¹²Cote v. United States, 3 Ct. Cl. 64.

¹³Stanton v. United States, 4 Ct. Cl. 456.

¹⁴Cross v. United States, 14 Wall. 479, 20 L. ed. 721.

¹⁵Chesapeake, etc. R. Co. v. United States, 19 Ct. Cl. 300.

¹⁶Mott v. United States, 13 Ct. Cl. 259.

amended by striking out the name of the other party.¹⁷ A partner cannot intervene and claim property already claimed by the firm.¹⁸ But if a person claims money not already claimed he may intervene.¹⁹

[b] Assignments.

Revised Statutes § 3477,³ making assignments of claims against the United States void applies to Court of Claims.⁴ Hence claims cannot be assigned so as to authorize the assignee to sue in his own name.⁵ An assignee for creditors may, however, sue in the name of the assignor.⁶ In order that the assignor may sue for the use of the assignee he must verify the petition or file a warrant of attorney, or prove the assignment.⁷ Where the assignor and assignee join as co-claimants and the former verifies the petition alleging that the suit is for the assignee, the assignment need not be proven.⁸ A decree in a State court appointing a receiver and authorizing him to sue in a Court of Claims has no force in the latter court and the suit will be dismissed.⁹

[c] Joint owners.

Claimants jointly interested may join in the suit, but a claimant jointly interested must show the extent of his interest.¹² Separate interests cannot be joined in one petition.¹³ If the suits of several claimants are united the first claimant will have to make out his claim against the United States only while the junior claimant will have to make his title good against the first claimant.¹⁴ Although one person is a member of two separate firms the firms cannot unite in one petition.¹⁵ Where a joint petition is filed by a feme covert and her husband, the former may prosecute in her own name on the death of the latter.¹⁶

[d] Verification of petition—dismissal.

If the petition is not verified a motion may be made to dismiss it;¹ or an amended petition properly verified may be filed.² If the assignor dies,

¹⁷Molina v. United States, 6 Ct. Cl. 269; Brewton v. United States, 5 Ct. Cl. 392.

¹⁸Bellocque v. United States, 8 Ct. Cl. 493.

¹⁹Mezeix v. United States, 6 Ct. Cl. 232; Turner v. United States, 2 Ct. Cl. 390.

³U. S. Comp. Stat. 1901, p. 2320.

⁴United States v. Crussell, 12 407, 24 L. ed. 503. See also Spofford v. Kirk, 97 U. S. 489, 24 L. ed. 1034; Bailey v. United States, 109 U. S. 437, 27 L. ed. 989, 3 Sup. Ct. Rep. 272.

⁵United States v. Gillis, 95 U. S. 407, 24 L. ed. 503.

⁶Morgan v. United States, 14 Ct. Cl. 319.

⁷Silverhill v. United States, 5 Ct. Cl. 610.

⁸Tebbetts v. United States, 5 Ct. Cl. 607.

⁹Howes v. United States, 24 Ct. Cl. 170.

¹²Headman v. United States, 5 Ct. Cl. 640.

¹³Wilson v. United States, 1 Ct. Cl. 318; Parish v. United States, 1 Ct. Cl. 345.

¹⁴Woodruff v. United States, 4 Ct. Cl. 486.

¹⁵Parish v. United States, 1 Ct. Cl. 345.

¹⁶Roddin v. United States, 6 Ct. Cl. 308.

¹Griffin v. United States, 13 Ct. Cl. 257.

²Griffin v. United States, 13 Ct. Cl. 257.

pendente lite, the verification of his executor to an amended petition sufficiently connects him with the case.³ If a petition presented by a firm avers a joint title and is verified by one partner, judgment will be rendered in favor of the firm.⁴ Claimant cannot dismiss his own suit until he has discharged his attorney with permission of the court.⁵

§ 1456. — Petition dismissed on claimant's failure to show allegiance.

The said allegations [as prescribed in the preceding section] as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed.

R. S. § 1073, U. S. Comp. Stat. 1901, p. 741.

The above section was originally enacted in 1863.⁶

§ 1457. — burden of proof as to loyalty.

Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in such rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be prima facie evidence that such person did give aid and comfort to said rebellion, and to the persons engaged therein.

R. S. § 1074, U. S. Comp. Stat. 1901, p. 742.

The above section was originally enacted in 1868.⁷ Proclamation of pardon and amnesty relieves the claimant who is within its terms from the necessity of proving that he gave no aid to the rebellion.⁸

1458. — court may appoint commissioners to take testimony.

The Court of Claims shall have power to appoint commissioners

³Pullen v. United States, 7 Ct. Cl. 507.

⁴Richmond v. United States, 7 Ct. Cl. 533.

⁵Reafield's Case, 27 Ct. Cl. 473.

⁶Act March 3, 1863, c. 92, § 12, 12 Stat. 767.

⁷Act June 25, 1868, c. 71, § 3, 15 Stat. 75.

⁸Armstrong v. United States, 13 Wall. 154, 20 L. ed. 614; Pargoud v. United States, 13 Wall. 156, 20 L. ed. 646; Carlisle v. United States, 16 Wall. 152, 21 L. ed. 428; Austin v.

to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.^{[a]-[c]}

R. S. § 1075, U. S. Comp. Stat. 1901, p. 742.

[a] In general.

The above section was carried forward into the Revised Statutes from an act of 1863.¹¹ Taking of testimony in Indian depredation claims is provided for under act of 1891.¹² Testimony to be used in the Court of Claims must be taken by deposition.¹³ Ex parte affidavits cannot be used;¹⁴ even though they are transmitted with the petition to Congress.¹⁵ The common law rules as to admission of testimony govern the court, unless a different rule is prescribed by statute.¹⁶

[b] Commission.

The application for the issue of a commission may be made at any time before trial.¹⁸ When it is made an order is entered by the clerk as of course.¹⁹ Commissioners also have been appointed to state the accounts, adjust the losses and marshal the assets between the different owners where the accounts are complicated.²⁰ Where a witness lives in the District of Columbia his testimony may be taken in court or before a commissioner; when at a distance it must be taken by a commission.¹

[c] Examination of witnesses.

Objections which go merely to the form of a question should be taken at the examination;³ so of objections to parole evidence of the contents of a written instrument.⁴ The right to examine a witness is lost after one examination and if the party requires a re-examination he must obtain leave of the court.⁵ On failure to obtain leave the admission of a second examination is still within the discretion of the court.⁶ When leave is

United States, 155 U. S. 425, 30 L. ed. 209, 15 Sup. Ct. Rep. 167.

¹¹Act March 3, 1863, c. 92, § 4, 12 Stat. 765. See also, act Feb. 24, 1855, c. 122, § 3, 10 Stat. 613.

¹²Post, § 1495.

¹³Hughes v. United States, 4 Ct. Cl. 64.

¹⁴Wiggins v. United States, 2 Ct. Cl. 345.

¹⁵Clark v. United States, 1 Ct. Cl. 246; McKee v. United States, 1 Ct. Cl. 336; Wilde v. United States, 7 Ct. Cl. 415.

¹⁶Aliens Case, 28 Ct. Cl. 141.

¹⁸Atocha v. United States, 6 Ct. Cl. 95.

¹⁹Gibbons v. United States, Dev. Ct. Cl. 138; Mahan v. United States, 6 Ct. Cl. 331.

²⁰Intermingled Cotton Cases, 92 U. S. 654, 23 L. ed. 756.

¹Etling's Case, 27 Ct. Cl. 158.

³Hughes v. United States, 4 Ct. Cl. 64.

⁴Hughes v. United States, 4 Ct. Cl. 64.

⁵Atocha v. United States, 6 Ct. Cl. 95; Mahan v. United States, 6 Ct. Cl. 331.

⁶Mahan v. United States, 6 Ct. Cl. 331.

granted the witness cannot be examined on other than the particular point specified.⁷

§ 1459. — or call on departments for information.

The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each house of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

R. S. § 1076, U. S. Comp. Stat. 1901, p. 742.

The above section was originally enacted in 1855.⁹ R. S. § 188 contains a somewhat similar provision. The replies which may be given cannot admit away or waive any defense or give a cause of action not possessed.¹⁰

§ 1460. — testimony not to be taken if no grounds for relief shown.

When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein.

R. S. § 1077, U. S. Comp. Stat. 1901, p. 742.

The above section was carried into the Revised Statutes from an act of 1855.¹²

§ 1461. — witnesses not excluded on account of color.

No witness shall be excluded in any suit in the Court of Claims on account of color.

R. S. § 1078, U. S. Comp. Stat. 1901, p. 743.

The above section was carried into the Revised Statutes from an act of 1868.¹⁴

§ 1462. — Order for claimant's examination before commissioner.

The court may, at the instance of the attorney or solicitor ap-

⁷Sevier v. United States, 7 Ct. Cl. 388.

⁹Act Feb. 24, 1855, c. 122, § 11, 10 Stat. 614. See also, act March 3, 1891, c. 538, § 11.

¹⁰Leonard v. United States, 18 Ct. Cl. 382.

¹²Act Feb. 24, 1855, c. 122, § 4, 10 Stat. 613.

¹⁴Act June 25, 1868, c. 71, § 4, 15 Stat. 75.

pearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

R. S. § 1080, U. S. Comp. Stat. 1901, p. 743.

The above section was carried forward into the Revised Statutes from an act of 1868.¹⁵ The provisions of this section are made applicable to suits brought under provision of act of March 3, 1887.¹⁶ The claimant is responsible for his own nonattendance only, and the case can be enjoined only because of his refusal to testify.¹⁷ A corporation claimant may be required to produce its officers for examination as under a bill of discovery.¹⁸ The application for an order to examine a claimant may be *ex parte* and no special ground need be set forth.¹⁹

§ 1463. — testimony taken where defendant resides.

The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.

R. S. § 1081, U. S. Comp. Stat. 1901, p. 743.

The above section was originally enacted in 1855.¹

§ 1464. — witnesses may be subpoenaed.

The Court of Claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpoenas shall

¹⁵Act June 25, 1868, c. 71, § 4, 15 Stat. 75.

¹⁶See act March 3, 1887, c. 359, § 8.

¹⁷*Macauley v. United States*, 11 Ct. Cl. 575.

¹⁸*Macauley v. United States*, 11 Ct. Cl. 575; *Atchison R. Co. v. United States*, 15 Ct. Cl. 1.

¹⁹*Touitts Case*, 30 Ct. Cl. 19.

¹Act Feb. 24, 1855, c. 122, § 3, 10 Stat. 613.

have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

R. S. § 1082, U. S. Comp. Stat. 1901, p. 744.

The above section was originally enacted in 1855.²

§ 1465. — cross-examination.

In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorneys to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

R. S. § 1083, U. S. Comp. Stat. 1901, p. 744.

The above section was originally enacted in 1855.³

§ 1466. — commissioner to administer oath to witness.

The commissioner taking testimony to be used in the court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination.

R. S. § 1084, U. S. Comp. Stat. 1901, p. 744.

The above section was originally enacted in 1855.⁴

§ 1467. — fees of commissioners, by whom paid.

When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the assistant attorney general, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

R. S. § 1085, U. S. Comp. Stat. 1901, p. 744.

The above section was originally enacted in 1855.⁵ The cost of printing the record is taxed against the losing party. It shall be collected by the clerk of the court, except where judgment is rendered against the United States.⁶

²Act Feb. 24, 1855, c. 122, § 3, 10 Stat. 613.

³Act Feb. 24, 1855, c. 122, § 5, 10 Stat. 613.

⁴Act Feb. 24, 1855, c. 122, § 3, 10 Stat. 613.

⁵Act Feb. 24, 1855, c. 122, § 3, 10 Stat. 613.

⁶Act March 3, 1877, c. 105, § 1, 19 Stat. 344.

§ 1468. — claims forfeited for fraud.

Any person who corruptly practises or attempts to practise any fraud against the United States in the proof, statement, establishment or allowance of any claim, or of any part of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practised or attempted to be practised, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same.

R. S. § 1086, U. S. Comp. Stat. 1901, p. 745.

The above section was originally enacted in 1863.⁸ Facts concerning fraud may be established on a new trial, though the original judgment has been paid and the claimant does not appear.⁹

§ 1469. — new trial, when granted on motion of claimant.

When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

R. S. § 1087, U. S. Comp. Stat. 1901, p. 745.

A motion for a new trial suspends judgment and continues the case within the jurisdiction of the court.¹¹ If the decision is founded on a mistake of law,¹² or judgment is entered on matters not properly in evidence, the claimant may file motion for review.¹³ A decision must generally be regarded as final, where there has been no oversight or misapprehension, unless one of the judges desires a reargument.¹⁴ A mistake in the findings does not entitle claimant to a new trial, but the error may be corrected while the proceedings are under the control of the court.¹⁵ A judgment will not generally be set aside after an intervening term.¹⁶ If the record is in the possession of the court an allowance of an appeal may be stricken out and a motion for a new trial entertained.¹⁷ Where a new trial has been granted but it appears from the new evidence that the same result will be reached, the court, instead of requiring a second trial, will vacate the order allowing it.¹⁸

⁸Act March 3, 1863, c. 92, § 11, 12 Stat. 767.

⁹*Peychand v. United States*, 16 Ct. Cl. 601.

¹¹*Calhoun v. United States*, 14 Ct. Cl. 193.

¹²*Calhoun v. United States*, 14 Ct. Cl. 193.

¹³*Aloord v. United States*, 9 Ct. Cl. 133.

¹⁴*Fendall v. United States*, 12 Ct. Cl. 305.

¹⁵*Calhoun v. United States*, 14 Ct. Cl. 193; *Neal v. United States*, 14 Ct. Cl. 477.

¹⁶*Figh v. United States*, 3 Ct. Cl. 97.

¹⁷*Ex parte Roberts*, 15 Wall. 384, 21 L. ed. 131. But see *Stern v. United States*, 6 Ct. Cl. 280.

¹⁸*Granthams Case*, 28 Ct. Cl. 528.

§ 1470. — when granted on motion of United States.

The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

R. S. § 1088, U. S. Comp. Stat. 1901, p. 745.

To give the section its full effect the court must have power to grant a new trial at a subsequent term, since such power may be exercised at any time within two years.¹ And a mandate from the Supreme Court cannot prevent its operation.² If a motion for a new trial is filed within two years after the disposition of the claim, action may be taken thereon, even after that time;³ and the objection of the lapse of more than two years after the entry of judgment cannot be made to a motion for a continuance.⁴ The mere filing of a motion for a new trial is no ground for dismissing an appeal;⁵ and the case on appeal will be continued to await the decision on the motion.⁶ It may be made even after filing a mandate affirming the judgment of the Court of Claims.⁷ If, however, a new trial is granted an appeal will be dismissed.⁸ The court has power to compel a witness to appear and testify in regard to a motion for a new trial.⁹ If one motion has been denied, a second, based on the same ground, will not be considered.¹⁰ When, however, a new trial is granted the decision is not appealable.¹¹ Where the court has revoked an order for the allowance of an appeal, it has power to hear, entertain and decide a motion for a new trial.¹²

§ 1471. — payment of judgments.

In all cases of final judgments by the Court of Claims, or, on

¹Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183.

²Idem.

³Bellock v. United States, 13 Ct. Cl. 195.

⁴United States v. Crussell, 12 Wall. 175, 20 L. ed. 384.

⁵United States v. Ayres, 9 Wall. 608, 19 L. ed. 625.

⁶United States v. Crussell, 12 Wall. 175, 20 L. ed. 384.

⁷Ex parte Russell, 13 Wall. 664, 20 L. ed. 131.

L. ed. 632; Ex parte United States 16 Wall. 699, 21 L. ed. 507.

⁸United States v. Ayers, 9 Wall. 608, 19 L. ed. 625; United States v. Young, 94 U. S. 258, 24 L. ed. 153.

⁹In re McKay, 30 Ct. Cl. 1.

¹⁰Child v. United States, 6 Ct. Cl. 441.

¹¹Young v. United States, 95 U. S. 641, 24 L. ed. 467. See also Belknap v. United States, 150 U. S. 591, 37 L. ed. 1192, 14 Sup. Ct. Rep. 183.

¹²Ex parte Roberts, 15 Wall. 384,

appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court.

R. S. § 1089, U. S. Comp. Stat. 1901, p. 745.

The above section was originally enacted in 1863.¹⁵ A subsequent provision requires the Secretary of the Treasury to certify to Congress for appropriation only such judgments as are not to be appealed or such judgments as, having been appealed, have been decided to be due and payable.¹⁶ Debts due the United States may be deducted from any judgment recovered against the United States.¹⁷

§ 1472. — rate and allowance of interest.

On judgments in favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum per annum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: Provided, That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed.

From appropriation act Sept. 30, 1890, c. 1126, § 1, 26 Stat. 537, U. S. Comp. Stat. 1901, p. 747.

This provision superseded R. S. § 1090, allowing interest at five per cent.

§ 1473. — no interest before judgment unless contract so stipulated.

No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

R. S. § 1091, U. S. Comp. Stat. 1901, p. 747.

The above section was carried forward into the Revised Statutes from

¹⁵Act March 3, 1863, c. 92, § 7, 12 Stat. 537, U. S. Comp. Stat. 1901, Stat. 766.

p. 747.

¹⁶Act Sept. 30, 1890, c. 126, § 1, ¹⁷Ante, § 1450.

act of 1863.¹⁹ Interest before judgment is properly allowable in claim of Cherokees where provided by treaty.²⁰

§ 1474. — payment a full discharge.

The payment of the amount due by any judgment of the Court of Claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

R. S. § 1092, U. S. Comp. Stat. 1901, p. 747.

The above section was originally enacted in 1863.¹ A claim is apparently not discharged till both the judgment and interest are paid.² After judgment and satisfaction the amount of the judgment cannot be corrected, even though the court made an arithmetical error.³

§ 1475. — final judgment against plaintiff a bar.

Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

R. S. § 1093, U. S. Comp. Stat. 1901, p. 747.

The above section was originally enacted in 1863.⁴ In general a judgment of the Court of Claims, when no appeal is taken, is absolutely conclusive.⁵ The section, however, relates only to judgments on the merits, hence sustaining a demurrer to a petition which failed to allege a necessary fact does not bar an action founded upon a petition which alleges such fact.⁶ But, though erroneous, a judgment is a bar to another suit.⁷ It will not, however, bar a subsequent suit for a different cause of action.⁸ Hence a judgment on one petition will not bar another petition for rent due at another time.⁹ If the claimant has consented to a judgment against him on a general demurrer he cannot subsequently sue on the same cause.¹⁰ So also if the claimant has had judgment rendered against him because

¹⁹Act March 3, 1863, c. 92, § 7, 12 Stat. 706.

²⁰United States v. Cherokee Nation, 202 U. S. 101, 50 L. ed. 949, 26 Sup. Ct. Rep. 588.

¹Act 3, 1863, c. 92, § 7, 12 Stat. 766.

²Hobbs v. United States, 19 Ct. Cl. 220. See also, United States v. Frerichs, 124 U. S. 320, 31 L. ed. 472, 8 Sup. Ct. Rep. 514.

³Russel v. United States, 15 Ct. Cl. 168.

⁴Act March 3, 1863, c. 92, § 7, 12 Stat. 766.

⁵United States v. O'Grady, 22 Wall. 641, 22 L. ed. 772.

⁶Spicer v. United States, 5 Ct. Cl. 34.

⁷Osborne v. United States, 9 Ct. Cl. 153.

⁸Shrewsbury v. United States, 9 Ct. Cl. 263.

⁹Cross v. United States, 14 Wall. 479, 20 L. ed. 721.

¹⁰Porter v. United States, 20 Ct. Cl. 307.

his claim was barred by the statute of limitations, the above section bars a suit on the same cause.¹¹

§ 1476. Procedure under Bowman act—averment of loyalty.

In any case of a claim for supplies or stores taken by or furnished to any part of military or naval forces of the United States for their use during the late war for the suppression of the rebellion, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

§ 4 of act March 3, 1883, c. 116, 22 Stat. 486, U. S. Comp. Stat. 1901, p. 749.

The claimant in all cases brought under the Revised Statutes must in his petition make an allegation of allegiance and loyalty.¹²

§ 1477. — Attorney General to represent government.

The Attorney General, or his assistants, under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under this act, with the same power to interpose counterclaims, offsets, defenses for fraud practised or attempted to be practised by claimants, and other defenses, in like manner as he is now required to defend the United States in said court.

§ 5 of act March 3, 1883, c. 116, 22 Stat. 486, U. S. Comp. Stat. 1901, p. 749.

§ 1478. — parties in interest may testify.

In the trial of such cases [i. e. cases under the Bowman act] no person shall be excluded as a witness because he or she is a party to or interested in the same.

§ 6 of act March 3, 1883, c. 116, 22 Stat. 486, U. S. Comp. Stat. 1901, p. 749.

¹¹Battelle v. United States, 21 Ct. Cl. 250. ¹²Ante, §§ 1455–1457.

The provision in the Revised Statutes that no claimant or other person interested in the suit is a competent witness¹⁴ is expressly repealed by act of 1887,¹⁵ which also contains a provision similar to the above.

§ 1479. — reports of court to Congress.

Reports of the Court of Claims to Congress under this act, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon.

§ 7 of act March 3, 1883, c. 116, 22 Stat. 486, U. S. Comp. Stat. 1901, p. 750.

§ 1480. Procedure under act of 1887—in general.

The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

§ 4 of act March 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 754.

§ 1481. — Attorney General to represent United States—appeal—judgment binding.

The Attorney General shall represent the United States at the hearing of said cause [i. e. a proceeding brought to ascertain the amount due by United States under act of 1887]. The court may postpone the same from time to time whenever justice shall require. The judgment of said court, or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties.

§ 3, cl. 2, of act March 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 754.

§ 1482. — trial to be by court without jury.

All cases brought and tried under the provisions of this act shall be tried by the court without a jury.

Part of § 2 of act March 3, 1887, c. 359, 24 Stat. 505, as amended 30 Stat. 495, U. S. Comp. Stat. 1901, p. 753.

¹⁴See R. S. § 1079.

¹⁵Act March 3, 1887, c. 359, § 8,
24 Stat. 506.
1259

The omitted portions of the above section confer concurrent jurisdiction on the district and circuit courts on claims under \$10,000.¹⁹

§ 1483. — petition and verification.

The plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law.

§ 5 of act March 3, 1887, c. 359, 24 Stat. 505, U. S. Comp. Stat. 1901, p. 754.

A petition is both process and declaration. As a declaration it may be amended.²⁰

§ 1484. — service of petition, appearance for United States and default.

The plaintiff shall cause a copy of his petition filed under the preceding section² to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer or demurrer on the part of the government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises; provided, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have

¹⁹Ante, §§ 130, 212.

²⁰Duran's Case, 31 Ct. Cl. 353.

judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

§ 6 of act March 3, 1887, c. 359, 24 Stat. 506, U. S. Comp. Stat. 1901, p. 755.

§ 1485. — opinions, findings, etc. to be in writing.

It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

§ 7 of act March 3, 1887, c. 359, 24 Stat. 506, U. S. Comp. Stat. 1901, p. 755.

Several judgments may be entered in a case where three suits have been united.³ The Court of Claims does not lose jurisdiction with expiration of the term unless final judgment has been rendered.⁴

§ 1486. — interested parties may testify.

In the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the government. Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

§ 8 of act March 3, 1887, c. 359, 24 Stat. 506, U. S. Comp. Stat. 1901, p. 755.

The act of 1887 expressly repealed R. S. § 1079, which provided that parties interested in any title, claim or right pending in the Court of Claims should not be competent witnesses. Interested parties are competent witnesses in all cases under the "Bowman act."⁷

§ 1487 — appeals and writs of error and procedure thereon.

The plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations

²Ante, § 1483.

³Barrow Porter & Cos. Case, 30

Ct. Cl. 54.

⁴Books Case, 31 Ct. Cl. 272.

⁷Ante, § 1478.

therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

§ 9 of act March 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

The Revised Statutes allow appeals to the Supreme Court from all judgments of Court of Claims in certain cases.⁹ The appeal provided for in the above section applies only to judgments.¹⁰ The finding of fact and law made by the court at the request of the department is not such a judgment.¹¹

§ 1488. — taking and perfecting appeal and limitation of time.

When the findings of fact and the law applicable thereto have been filed in any case as provided in section 6 of this act,¹² and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same; provided, that no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

§ 10 of act March 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

§ 1489. — Attorney General to report to Congress.

The Attorney General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which

⁹Ante, § 58.

¹⁰Sansborns Case, 27 Ct. Cl. 485; L. ed. 430, 13 Sup. Ct. Rep. 577.

In re Sanborn, 148 U. S. 222, 37 L. ed. 430, 13 Sup. Ct. Rep. 577.

¹¹In re Sanborn, 148 U. S. 222, 37

L. ed. 430, 13 Sup. Ct. Rep. 577.

¹²Ante, § 1084.

a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case.

§ 11 of act March 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

§ 1490. — costs.

If the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

§ 15 of act March 3, 1887, c. 359, 24 Stat. 508, U. S. Comp. Stat. 1901, p. 758.

The existing law as to costs generally will be found in a subsequent chapter.¹⁵

§ 1491. — inconsistent laws repealed.

All laws and parts of laws inconsistent with this act are hereby repealed.

§ 16 of act March 3, 1887, c. 359, 24 Stat. 508, U. S. Comp. Stat. 1901, p. 758.

§ 1492. Procedure on Indian depredation claims—petition.

All claims [i. e. for Indian depredations] shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

§ 3 of act March 3, 1891, c. 538, 26 Stat. 852, U. S. Comp. Stat. 1901, p. 760.

¹⁵Post, § 1822, et seq.

Court may bring in new Indian defendants after the statutory period for bringing such suits has expired.¹⁷ The jurisdiction over suits for Indian depredations is stated in an earlier chapter of this Code.¹⁸

§ 1493. — service on and defense by Attorney General.

The service of the petition shall be made upon the Attorney General of the United States, in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney General of the United States to appear and defend the interests of the government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer or demurrer on the part of the government and the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the government or of the Indians in the premises: Provided, That should the Attorney General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proofs satisfactory to the court; provided, that any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the commissioner of Indian affairs, if he or they shall choose so to do.

§ 4, cl. 1, of act March 3, 1891, c. 538, 26 Stat. 852, U. S. Comp. Stat. 1901, p. 761.

The service of the petition on the Attorney General is all that is required, the Indians not being entitled to notice.¹ The claimant cannot have judgment by default.²

§ 1494. — evidence, priorities, reopening case.

In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence and such weight given thereto as in its judgment is right and proper: Provided, That all unpaid claims which have heretofore been examined, approved, and allowed by the secre-

¹⁷Durans Case, 31 Ct. Cl. 353.

¹⁸Ante, § 240.

¹Jaegers Case, 27 Ct. Cl. 278.

²Kings Case, 31 Ct. Cl. 304.

tary of the interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs: Provided, That the party electing to reopen the case shall assume the burden of proof.

§ 4, cl. 2, of act March 3, 1891, c. 538, 26 Stat. 852, U. S. Comp. Stat. 1901, p. 761.

Where the defendants have not signified their intention to reopen, a motion for judgment is premature.⁴ When reopened the whole case is tried *de novo*, subject only to the provision concerning the burden of proof.⁵

§ 1495. — taking testimony, parties as witnesses, judgment.

The said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the government; that the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified.

§ 5 of act March 3, 1891, c. 538, 26 Stat. 853, U. S. Comp. Stat. 1901, 762.

§ 1496. — judgments to be charged against Indians.

The amount of any judgment so rendered against any tribe of

⁴Mitchells Case, 27 Ct. Cl. 316.

⁵Leightons Case, 29 Ct. Cl. 288.

Fed. Proc.—80.

Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the treasury of the United States: Provided, That any amount so paid from the treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

§ 6 of act March 3, 1891, c. 538, 26 Stat. 853, U. S. Comp. Stat. 1901, p. 762.

§ 1497. — judgments final unless new trial or appeal.

All judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

§ 7 of act March 3, 1891, c. 538, 26 Stat. 853, U. S. Comp. Stat. 1901, p. 762.

§ 1498. — lists of judgments sent to Congress and paid.

Immediately after the beginning of each session of Congress, the Attorney General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

§ 8 of act March 3, 1891, c. 538, 26 Stat. 853, U. S. Comp. Stat. 1901, p. 762.

§ 1499. — assignment of claims void—attorney fees.

All sales, transfers, or assignments of any such claims heretofore

or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void, and all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors or administrators or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court.

§ 9 of act March 3, 1893, c. 538, 26 Stat. 854, U. S. Comp. Stat. 1901, p. 763.

All fees are to be regulated by the court.¹⁰

§ 1500. — appeals—mode of procedure.

The claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceedings brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases.

§ 10 of act March 3, 1891, c. 538, 26 Stat. 854, U. S. Comp. Stat. 1901, p. 763.

§ 1501. — papers in departments and before Congress to be furnished court.

All papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the clerk of the House of Representatives, or certified copies of the same, relating to any claims au-

¹⁰Turners Case, 32 Ct. Cl. 192.

thorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the Attorney General.

§ 11 of act March 3, 1891, c. 538, 26 Stat. 854, U. S. Comp. Stat. 1901, p. 763.

The Court of Claims has general power to call for any papers or information it may deem necessary.¹²

§ 1502. — Assistant Attorney General to be appointed.

To facilitate the speedy disposition of the cases herein provided for [claims for Indian depredations], in said Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of Assistant Attorneys Generals, one additional Assistant Attorney General of the United States, who shall receive a salary of \$2,500 per annum.

§ 12 of act March 3, 1891, c. 538, 26 Stat. 854, U. S. Comp. Stat. 1901, p. 763.

In 1893 the compensation of such assistant was increased to \$5,000, that being the amount paid other Assistant Attorneys General under R. S. § 348.¹³

§ 1503. Procedure on various kinds of claims.

There are other acts of Congress conferring jurisdiction on the Court of Claims over various claims, which, being temporary in character, are omitted from this Code.¹⁴ The French spoliation claims act of 1885,¹⁵ for instance, is of this nature and contained a number of provisions respecting the procedure to be followed, which are omitted herefrom.

Author's section.

1504. Payment of judgments and awards through department auditors.

Hereafter in all cases of final judgments and awards rendered against the United States by the Court of Claims, and of final judgments rendered against the United States by the circuit and district courts of the United States, payment thereof under appropriations made by Congress shall be made on settlements by the auditor for

¹²Ante, § 1459.

¹⁴See Ante, § 242.

¹³See proviso in appropriation act of Dec. 21, 1893, c. 3, 28 Stat. 19.

¹⁵Act Jan. 20, 1885, c. 25, 23 Stat. 283, U. S. Comp. Stat. 1901, p. 750.

the department or branch of the public service having jurisdiction over the subject-matter out of which the claims arose.

Provision in urgency deficiency appropriation act Feb. 18, 1904, c. 160, § 1, 33 Stat. 41, U. S. Comp. Stat. 1905, p. 165.

CHAPTER 45.

SEARCHES AND SEIZURES.

- § 1508. Constitutional guaranty against searches and seizures.
- § 1509. Issue of search warrants in revenue cases.
- § 1510. —in customs cases.
- § 1511. —in counterfeiting cases.
- § 1512. —for obscene importations, lottery tickets, etc.
- § 1513. When burden of proof on claimant in seizure for duties.
- § 1514. Consolidation of revenue seizure cases.
- § 1515. Notice of seizure and libel—procedure if no claimant appears.
- § 1516. Property taken under revenue laws irrepleviable.
- § 1517. Bailing of property seized under revenue laws.
- § 1518. Sale after condemnation.
- § 1519. Bailing of property in vacation.
- § 1520. No costs for successful claimant, nor right of action, when reasonable cause of seizure.
- § 1521. Double costs on nonsuit in action against seizing officer.

§ 1508. Constitutional guaranty against searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. Amend. art. 4.

The above inhibition against unreasonable searches and seizures is a limitation on the power of the United States to make such searches and seizures for its own benefit,¹ and has no reference to the unauthorized acts of individuals.² It may be invoked by aliens residing in the United States.³ There is a seizure within the meaning of this provision where the officer asserts control with the present power and intent to exercise it.⁴ The refusal by a postmaster to deliver mail to a private person and

¹Smith v. Maryland, 18 How. 76, 15 L. ed. 269.

²Bacon v. United States, 97 Fed. 35, 38 C. C. A. 37.

³United States v. Wong Quong Wong, 94 Fed. 832.

⁴Miller v. United States, 11 Wall. 297, 20 L. ed. 135.

its return to the dead letter office or to the sender is a violation of the above amendment, although it was done by the order of the Postmaster General.⁵ So also it is held to be a violation of the amendment to compel the wife of a bankrupt, under examination as a witness, to disclose confidential communications made to her by her husband.⁶

§ 1509. Issue of search warrants in revenue cases.

The several judges of the circuit and district courts of the United States, and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

R. S. § 3462, U. S. Comp. Stat. 1901, p. 2283.

The section was originally enacted in 1866.⁷ All the requirements for search warrants are not set forth herein, and the section must be construed with the Fourth Amendment to the Constitution.⁸

§ 1510. — in custom cases.

If any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector, shall have cause to suspect a concealment of any merchandise in any particular dwelling house, store-building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, or district judge of cities, police justice, or any judge of the circuit or district court of the United States or any commissioner of the United States circuit court, shall be entitled to a warrant to enter such house, store or other place, in the daytime only, and there to search for such merchandise, and if any shall be found to seize and secure the same for trial; and all such merchandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited.

R. S. § 3066, as amended act April 25, 1882, c. 89, U. S. Comp. Stat. 1901, p. 2008.

It has been held that the concealment need not be with any knowledge or concurrence on the part of the owner or consignee and that the forfeiture may be enforced before the time has passed for the owner to enter the goods.⁹

⁵Hoover v. McChesney, 81 Fed. 472.

⁸See Post, § 1509.

⁶In re Jefferson, 96 Fed. 826.

⁹United States v. Lot of Cigars, 21

⁷Act July 13, 1866, c. 184, 14 Stat. Law Rep. 267.

§ 1511. — in counterfeiting cases.

The several judges of courts established under the laws of the United States and the commissioners of such courts may, upon proper oath or affirmation, within their respective jurisdictions, issue a search-warrant authorizing any marshal of the United States, or any other person specially mentioned in such warrant, to enter any house, store, building, boat, or other place named in such warrant, in the daytime only, in which there shall appear probable cause for believing that the manufacture of counterfeit money, or the concealment of counterfeit money, or the manufacture or concealment of counterfeit obligations or coins of the United States or of any foreign government, or the manufacture or concealment of dies, hubs, molds, plates, or other things fitted or intended to be used for the manufacture of counterfeit money, coins, or obligations of the United States or of any foreign government, or of any bank doing business under the authority of the United States or of any State or Territory thereof, or of any bank doing business under the authority of any foreign government or of any political division of any foreign government, is being carried on or practised, and there search for any such counterfeit money, coins, dies, hubs, molds, plates, and other things, and for any such obligations, and if any such be found, to seize and secure the same, and to make return thereof to the proper authority; and all such counterfeit money, coins, dies, hubs, molds, plates, and other things and all such counterfeit obligations so seized shall be forfeited to the United States.

§ 5, act of Feb. 10, 1891, c. 127, 26 Stat. 743, U. S. Comp. Stat. 1901, p. 3687.

§ 1512. — for obscene importations, lottery tickets, etc.

Any judge of any district or circuit court of the United States, within the proper district before whom complaint in writing of any violation of the two preceding sections [prohibiting the importation of obscene books, pictures, and of lottery tickets and medicine to secure abortion] is made, to the satisfaction of such judge, and founded on knowledge or belief, and if upon belief, setting forth the grounds of such belief, and supported by oath or affirmation of the complainant, may issue, conformably to the Constitution, a warrant directed to the marshal, or any deputy marshal, in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned in the two preceding sections, and

to make due and immediate return thereof to the end that the same may be condemned and destroyed by proceedings which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error.

§ 18, act July 24, 1897, c. 11, 30 Stat. 209, U. S. Comp. Stat. 1901, p. 1697.

§ 1513. When burden of proof on claimant in seizure for duties.

In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: Provided, That probable cause is shown for such prosecution, to be judged of by the court.

R. S. § 909, U. S. Comp. Stat. 1901, p. 679.

The above section was originally enacted in 1799.¹² In all cases where probable cause for seizure, in pursuance of acts providing for or regulating the collection of duties is shown, the burden of proof rests upon the claimant,¹³ the rule not being confined to cases arising under revenue laws in existence at the time the above provision was passed, but being applicable to cases arising under all revenue laws.¹⁴ The words "probable cause" mean reasonable grounds of presumption that the accusation is well founded; the establishment of a case which requires of the claimant such testimony as will satisfactorily rebut the presumption of guilt which it raises.¹⁵ Whether or not such probable cause is established is a question of law to be decided by the court.¹⁶

§ 1514. Consolidation of revenue seizure cases.

Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them.

R. S. § 920, U. S. Comp. Stat. 1901, p. 685.

¹²Act Mar. 2, 1799, c. 22, §§ 70, 71, v. United States, 3 How. 211, 11 L. ed. 559; Clifton v. United States, 4 Stat. 678.

¹³Three Thousand, etc. Boxes v. United States, 23 Fed. 367; Cliquot v. Champagne, 3 Wall. 144, 18 L. ed. 116; The Ocean Bride, 1 Hask. 340, Fed. Cas. No. 10,404; Taylor v. United States, 3 How. 211, 11 L. ed. 559; Coquitlam, 57 Fed. 714.

¹⁴Cliquot v. Champagne, 3 Wall. 144, 18 L. ed. 116. See also, Taylor

How. 242, 11 L. ed. 957.
¹⁵The John Griffin, 15 Wall. 33, 21 L. ed. 80; Word v. United States, 16 Pet. 345, 10 L. ed. 989. See also, Locke v. United States, 7 Cranch, 339, 3 L. ed. 364.

¹⁶Taylor v. United States, 3 How.

The above section was carried into the Revised Statutes from an act of 1853.¹⁹

§ 1515. Notice of seizure and libel—procedure if no claimant appears.

When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares or merchandise, and gives bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law.

R. S. § 923, U. S. Comp. Stat. 1901, p. 686.

The necessary allegations of the libel of information in cases of seizure of vessels for breach of the revenue or navigation laws, are set forth in a previous Code section.¹ The general rule is that a seizure must precede the filing of the libel in order to give the court jurisdiction.² The section does not apply to an action brought by a private individual against the owner of a vessel for carrying too great a number of passengers.³ Where no one files a claim the court may decree a forfeiture.⁴ But since the "court shall proceed to hear and determine the cause according to law" there must be some hearing before a forfeiture can be decreed, the extent of the hearing depending on circumstances of each case.⁵

§ 1516. Property taken under revenue laws irrepleviable.

All property taken or detained by any officer or other persons, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law,

¹⁹Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

¹See ante § 1199.

²The *Lewellen*, 4 Biss. 162, Fed. Cas. No. 8,307; *Hatch v. Steamboat Boston*, 3 Fed. 811.

³*Hatch v. The Boston*, 3 Fed. 811.

⁴*The Mary Anne*, 1 Ware, 104, Fed. Cas. No. 9,195.

⁵*United States v. Schooner Lion*, 1 Sprague, 399, Fed. Cas. No. 15,607.

and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

R. S. § 934, U. S. Comp. Stat. 1901, p. 689.

Property taken under the revenue law is by this section expressly made subject only to the orders and decrees of the United States courts.⁶ Replevin does not lie for property of the plaintiff seized by an internal revenue officer as the property of another.⁷ Replevin in Federal courts is elsewhere considered.⁸

§ 1517. Bailing of property seized under revenue laws.

Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered,^[a] the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court^[b] If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares, or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs,

⁶Ex parte Fassett, 142 U. S. 486, 35 L. ed. 1090, 12 Sup. Ct. Rep. 295.

⁷Brice v. Elliott, 22 Int. Rev. Rec. 206, Fed. Cas. No. 1854.

⁸Ante, § 908.

judgment shall be granted upon the bond, on motion in open court, without further delay.

R. S. § 938, U. S. Comp. Stat. 1901, p. 690.

[a] Appraisal of property and giving of bond.

The value of the goods appraised after a seizure is to be ascertained at the place of importation.¹¹ And the bond should be for the actual cash value of the property at the time and place of seizure without deductions for duties paid where the goods have been seized in the hands of the importers,¹² or in the warehouse.¹³ A bond obviously given in pursuance of Revised Statutes, § 941, providing for bonds in proceedings in rem in causes in admiralty jurisdiction other than cases of seizure for forfeiture¹⁴ is binding on the claimants under the above section, and if the claimants do not within the twenty days provided pay the appraised value of the vessel into the court with costs, judgment can be granted on such bond.¹⁵ Where a vessel has been libeled for forfeiture and part of the cargo is of a perishable nature, the disposition of the property may be decided in accordance with the admiralty practice,¹⁶ as well as under the above enactment.¹⁷

[b] Claimant entitled to property.

A claimant is entitled, upon giving the bond required, to have the property delivered to him, and cannot be required, as a condition precedent, to pay the costs incident to the seizure since the government is amply protected by the bond.¹⁸ The warrant or order for the delivery of the goods should run to the marshal who serves a certificate thereof upon the collector.¹⁹ But the government has a right to be heard as to the propriety of a delivery on bail and no delivery ought to be made until all objections have been heard and considered.²⁰

§ 1518. Sale after condemnation.

All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the

¹¹*Ferguson v. United States*, 19 Law Rep. 621.

¹²*United States v. Three Horses*, 1 Abb. U. S. 426, Fed. Cas. No. 16,500.

¹³*United States v. Bales of Tobacco*, 2 Lowell, 107, Fed. Cas. No. 15,965; *United States v. Bags of Sugar*, 1 Abb. U. S. 407, Fed. Cas. No. 16,555.

¹⁴See ante, § 1220.

¹⁵*The Haytian Republic*, 57 Fed. 511.

¹⁶See Adm. Rule 10, ante § 1222.

¹⁷*The G. G. King*, 16 Fed. 923. See *The Alligator*, 1 Gall. 149, Fed. Cas. No. 248.

¹⁸*United States v. Eight Cases, etc.* 98 Fed. 416.

¹⁹*The G. G. King*, 16 Fed. 924.

²⁰*Ex parte Robbins*, 2 Gall. 320, Fed. Cas. No. 11,879.

court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed.

R. S. § 939, U. S. Comp. Stat. 1901, p. 691.

§ 1519. Bailing of property in vacation.

In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of said court, in vacation, shall have the same authority to order any vessel, or cargo, or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term-time, and to appoint appraisers, and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale as are had in like cases when ordered in term-time: Provided, That upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases.

R. S. § 940, U. S. Comp. Stat. 1901, p. 691.

§ 1520. No costs for successful claimant, nor right of action, when reasonable cause of seizure.

When, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure,

judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution:^{[a]-[b]} Provided, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.^[c]

R. S. § 970, U. S. Comp. Stat. 1901, p. 702.

[a] Scope of section.

The provisions of this section were intended to be confined to cases where the collector makes a seizure followed by a prosecution by the United States for a penalty or forfeiture arising from an illegal act of the persons in charge of the vessel, and they were not intended to be applied where the vessel was simply detained for nonpayment of duty.⁴ The section protects district attorneys, collectors of customs and supervisors of internal revenue.⁵

[b] Reasonable cause—certificate thereof.

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that an offense had been committed it is sufficient, and the personal motives of the officer are immaterial.⁷ Reasonable cause is held to mean the same as probable cause.⁸ The fact that goods seized were not mentioned in the manifest furnishes reasonable grounds for seizure.⁹ The granting of the certificate of reasonable cause is not a final judgment, it being a collateral matter arising after final judgment.¹⁰ Hence refusal to grant such certificate is not appealable.¹¹ The decree of acquittal, accompanied by a denial of the certificate of probable cause, conclusively establishes a tortious seizure and entitles the owner to damages.¹²

[c] Return of property.

It is the duty of the claimant to move the court for the necessary orders to cause the return of the property. And the benefit to which the collector is entitled under the certificate of probable cause cannot be denied

⁴The Conqueror, 166 U. S. 124, 41 L. ed. 944, 17 Sup. Ct. Rep. 510.

⁵Stacey v. Emery, 97 U. S. 642, 24 L. ed. 1035.

⁷Stacey v. Emery, 97 U. S. 642, 21 L. ed. 1035.

⁸The City of Mexico, 25 Fed. 924. See Frerichs v. Coster, 22 Fed. 637, 23 Blatchf. 74.

⁹United States v. A Lot of Silk Umbrellas, 12 Fed. 412.

¹⁰United States v. Abatoir Place, 106 U. S. 162, 27 L. ed. 128, 1 Sup. Ct. Rep. 169.

¹¹United States v. Abatoir Place, 106 U. S. 162, 27 L. ed. 128, 1 Sup. Ct. Rep. 169; United States v. Frerichs, 124 U. S. 317, 31 L. ed. 472, 8 Sup. Ct. Rep. 515; The Elmira, 16 Fed. 139.

¹²Averill v. Smith, 17 Wall. 93, 21 L. ed. 613.

on the ground that he did not return the property, it being in the possession of the court.¹⁵ While in possession of the court its officers are liable for negligent or dishonest acts whereby the property is injured or destroyed.¹⁶

§ 1521. Double costs on non-suit in action against seizing officer.

If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs.

R. S. § 971, U. S. Comp. Stat. 1901, p. 703.

The above section was originally enacted in 1799.¹⁹

¹⁵Averill v. Smith, 17 Wall. 82, 21 L. ed. 613.

¹⁶Burke v. Trevitt, 1 Mason, 96, Fed. Cas. No. 2,163.

¹⁹Act July 2, 1799, c. 22, § 71, 1 Stat. 678.

CHAPTER 46.

PROVISIONS RESPECTING FOREIGN SEAMEN AND OFFENSES AGAINST NAVIGATION LAWS.

- § 1523. Arrest and return of seamen deserting from foreign vessels.
- § 1524. Power of foreign consuls over disputes between foreign seamen.
- § 1525. —arrest on application of consul—examination.
- § 1526. —commitment and discharge.
- § 1527. Summary trials of offenses against navigation laws.
- § 1528. —complaint and answer.
- § 1529. —amendments and adjournments.
- § 1530. —challenges to jurors.
- § 1531. —limit of sentence.

§ 1523. Arrest and return of seamen deserting from foreign vessels.

On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such de-

serter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect.

R. S. § 5280, U. S. Comp. Stat. 1901, p. 3598.

The above section was carried into the Revised Statutes from acts of 1829¹ and of 1855.² It provides the only remedy in case of foreign seamen deserting.³ The section applies only to seamen belonging to a country with which United States has a treaty providing for the arrest and surrender of deserting seamen.⁴ It does not authorize the restoration of the seamen to the ship but merely permits their delivery to the consul.⁵

§ 1524. Power of foreign consuls over disputes between foreign seamen.

Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul general, consuls, vice-consuls, or consular or commercial agents of each nation, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation.

R. S. § 4079, U. S. Comp. Stat. 1901, p. 2766.

The above section was originally enacted in 1864.⁶ It is a rule well settled that the judicial power of consuls depends on treaty stipulations.⁷ Unless restricted by treaty a United States district court may, in the

¹Act Mar. 2, 1859, c. 41, 4 Stat. 359.

²Act Feb. 24, 1855, c. 123, 10 Stat.

614.

³United States v. Minges, 5 Hughes, 494, 16 Fed. 657.

⁴Tucker v. Alenxandroff, 183 U. S. 434, 449, 46 L. ed. 269, 22 Sup. Ct. Rep. 195. See also United States v. Kelly, 108 Fed. 540.

⁵United States v. Kelly, 108 Fed. 540.

⁶Act June 11, 1864, c. 116, § 1, 13 Stat. 121.

⁷Daniese v. Hale, 91 U. S. 13; 23 L. ed. 190; United States v. Craig, 28 Fed. 801; In Re Aubrey, 26 Fed. 851; The Elwin Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426; The William Harris, Ware, 373, Fed. Cas. No. 17,695.

exercise of its discretion, assume jurisdiction of a claim for wages against a foreign vessel, especially when there is no consul within its jurisdiction.⁸

§ 1525. — arrest on application of consul—examination.

In all cases within the purview of the preceding section the consul general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping articles, roll or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official seal. Thereupon such court, judge, or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place.

R. S. § 4080, U. S. Comp. Stat. 1901, p. 2766.

The above section was originally enacted in 1864.⁹

§ 1526. — commitment and discharge.

If, on such examination, it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commis-

⁸The *Amalia*, 3 Fed. 652; The *Salomoni*, 29 Fed. 534.

⁹Act June 11, 1864, c. 116, § 2, 13 Stat. 121.

sioner finds, upon the papers hereinbefore referred to, a sufficient prima facie case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any State thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested shall be paid by the consular officers making the application.

R. S. § 4081, U. S. Comp. Stat. 1901, p. 2767.

The above section was first enacted in 1864.¹¹

§ 1527. Summary trials of offenses against navigation laws.

Whenever a complaint shall be made against any master, officer or seaman of any vessel belonging, in whole or in part, to any citizen of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court, either in term-time or vacation.

R. S. § 4300, U. S. Comp. Stat. 1901, p. 2952.

The above section was carried forward into the Revised Statutes from

¹¹Act June 11, 1864, § 2, 13 Stat.
121.

an act of 1864.¹² By the act of 1888¹³ the provisions of the Revised Statutes for the trial of certain offenses against the navigation laws as set forth in this and following sections¹⁴ apply to the trial of offenses against the provisions of §§ 4 and 5 of that act, as to the observance of signals, in laying and repairing submarine cables and as to the duties of fishing vessels in keeping their nets out of the way. R. S. § 563, gives the district court jurisdiction over all crimes and offenses not capital committed on the high seas.¹⁵

§ 1528. — complaint and answer.

At the summary trial of offenses against the laws for the protection of persons or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath in writing, shall be presented to the court, setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint. The complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement. The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty.

R. S. § 4301, U. S. Comp. Stat. 1901, p. 2953.

The above section was originally enacted in 1864.¹⁷ It seems doubtful whether that part of the section providing for trial by the court is constitutional, and it is usual therefore to try all contested cases by jury.¹⁸ Summary proceedings are put substantially on the footing of civil cases, and due verification of the complaint is waived by the voluntary appearance of the accused.¹⁹

§ 1529. — amendments and adjournments.

It shall be lawful for the court to allow the district attorney to amend his statement of complaint at any stage of the proceedings, before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appears to the court that the accused is unprepared to meet the charge as amended, and that

¹²Act June 11, 1864, c. 121, § 2, 13 Stat. 124.

¹³Act Feb. 29, 1888, c. 17, § 11, 25 Stat. 42.

¹⁴Ante, §§ 1528-1531.

¹⁵See ante, § 193.

¹⁷Act 11 June, 1864, c. 121, §§ 3, 4, 13 Stat. 125.

¹⁸In re Smith, 13 Fed. 26.

¹⁹United States v. Smith, 17 Fed. 510.

an adjournment of the cause will promote the ends of justice, such adjournment shall be made, until a further day, to be fixed by the court.

R. S. § 4302, U. S. Comp. Stat. 1901, p. 2953.

The above section was carried into the Revised Statutes from an act of 1864.¹

§ 1530. — challenges to jurors.

At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause in such cases shall be tried by the court without the aid of triers.

R. S. § 4303, U. S. Comp. Stat. 1901, p. 2953.

The above section was carried into the Revised Statutes from an act of 1864.²

§ 1531. — limit of sentence.

It shall not be lawful for the court to sentence any person convicted in such trial to any greater punishment than imprisonment in jail for one year, or to a fine exceeding five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine.

R. S. § 4304, U. S. Comp. Stat. 1901, p. 2953.

The above section was first enacted in 1864.³

¹Act 11 June, 1864, c. 121, § 6, 13 Stat. 125.

³Act June 11, 1864, c. 121, § 5, 13 Stat. 125.

²Act June 11, 1864, c. 121, § 7, 13 Stat. 125.

CHAPTER 47.

ARREST AND BAIL, CIVIL AND CRIMINAL.

- § 1537. Offenders against United States, how arrested and removed for trial.
- § 1538. —to be taken before nearest officer for hearing—complaint to be attached to warrant.
- § 1539. Removal of bankrupt from one district to another.
- § 1540. Removal of offenders to and from the Philippine Islands.
- § 1541. Arrest and bail of persons found operating illicit distillery.
- § 1542. United States commissioners may arrest for internal revenue violations.
- § 1543. Excessive bail prohibited.
- § 1544. Bail admitted in cases not capital.
- § 1545. Bail in capital cases.
- § 1546. Bail on appeal to Supreme Court from highest State court.
- § 1547. Bail on appeal to Supreme Court from circuit and district courts.
- § 1548. —on appeal to circuit court of appeals.
- § 1549. Surrender of accused by his bail.
- § 1550. When increased bail required—commitment for want thereof.
- § 1551. When penalty of recognizances may be remitted.
- § 1552. Special bail in suits for duties and penalties.
- § 1553. Defendant giving bail in one district committed in another—discharge of bail.
- § 1554. —such defendant held until judgment and sixty days thereafter.
- § 1555. Bail and affidavits taken by commissioners in civil cases.
- § 1556. Calling of bail in Kentucky.
- § 1557. When clerks may take recognizances of special bail *de bene esse*.
- § 1558. Imprisonment for debt.
- § 1559. —right and proceedings as to discharge same as in State court.
- § 1560. —same right to privilege of jail limits.
- § 1561. Penalty for allowing prisoners to escape.
- § 1562. —applies to prisoners charged as well as convicted.

§ 1537. Offenders against United States, how arrested and removed for trial.

For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge

of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found,^[a] and agreeably to the usual mode of process against offenders in such State,^[b] and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.^{[c]-[e]} Copies of the process shall be returned as speedily as may be into the clerk's office of such court,¹ together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed^[h] in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district,^[i] where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.^{[j]-[k]}

R. S. § 1014, U. S. Comp. Stat. 1901, p. 716.

[a] History of section and cross references.

Section 33 of the act of 1789² was the original provision on this subject. It provided only for commitment by a Federal judge or a "justice of the peace or other magistrate," omitting commissioners, mayors of cities etc. At the close of the second sentence of the original enactment were the words: "Which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment." The original provision as to removal to another district for trial was as follows: "And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had." The subsequent act of 1842⁴ gave to circuit court commissioners the powers that a justice of the peace or other State magistrate exercised under the act of 1789. An act of 1896 as amended in 1901 abolished the office of circuit court commissioners and created the office of United States commissioners.⁵ The powers and duties of the former officers, as theretofore exercised were vested in the latter officers. Another section allows judges or other officers, authorized to arrest, imprison or bail persons charged with offenses against the United States, to require witnesses to give recognizances for their appearance.⁶ The trial of offenses punishable with death is required to be in the county where the offense was committed if it can be done with-

¹Compare § 1532, post.

²Act Sept. 24, 1789, c. 20, § 33.

¹ Stat. 91.

⁴Act August 22, 1842, c. 188, § 1, 5 Stat. 516.

⁵See ante, § 672.

⁶See post, § 1745.

out great inconvenience.⁷ Offenses committed on the high seas or elsewhere out of the jurisdiction of any particular State or district, are to be tried in the district in which the offender is found or into which he is first brought.⁸ Offenses begun in one district and completed in another may be tried in either district.⁹ The bankruptcy act of 1898 provides for the removal of of a bankrupt from one district to another.¹⁰ This section has no application to extradition proceedings.¹¹ While there are numerous officers given authority by the above section to hold the preliminary hearing, it is the proper practice to go before the nearest United States commissioner.¹² Indeed, it is now the marshal's duty to take accused before such nearest commissioner.¹³ Removal to the District of Columbia may be had under this section.¹⁴

[b] Mode of process same as that of particular State.

The "mode of process" includes the power to admit to bail.¹⁷ Proceedings for holding the defendant to answer before a United States court are by the section made to correspond to the procedure of the State where the proceedings are had;¹⁸ except where the latter contravene an express Federal statute.¹⁹ Hence the authority of a United States commissioner to take bail depends on the laws of the State giving authority to the examining magistrate.²⁰ Likewise a complaint on information and belief only, does not warrant an arrest where the State law requires a complaint on oath alleging that the accused has been guilty of some designated offense.¹ So as to fees, it is proper to look to the laws of the State in which the services are rendered.² Likewise a commissioner may order a recognizance to be given to appear before him in those States where a

⁷See ante, § 427.

⁸See ante, § 428.

⁹Ante, § 430.

¹⁰Post, § 1539.

¹¹In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369.

¹²United States v. Yarborough, 122 Fed. 296.

¹³Post, § 1538.

¹⁴Hyde v. Shine, 199 U. S. 75, 50 L. ed. 94.

¹⁷United States v. Martin, 17 Fed. 150, 9 Sawy. 90; United States v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208.

¹⁸United States v. Tureaud, 20 Fed. 621; United States v. Dunbar, 83 Fed. 151, 27 C. C. A. 488; United States v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208; United States v. Harden, 10 Fed. 803, 4 Hughes 455; United States v. Horton Securities, 2 Dill. 94, Fed. Cas. No. 15,393; Hallitt v. United States, 63 Fed. 825; United States v. Dundy, 76 Fed. 356,

22 C. C. A. 219; United States v. Rand, 53 Fed. 350, 3 C. C. A. 556; United States v. Sauer, 73 Fed. 674; United States v. Keiver, 56 Fed. 425; United States v. Greene, 100 Fed. 941; In re Dana, 68 Fed. 892, 893.

¹⁹Turner v. United States, 19 Ct. Cl. 640. See also United States v. Ewing, 140 U. S. 142, 38 L. ed. 388, 11 Sup. Ct. Rep. 743; West v. Cabell, 153 U. S. 78, 38 L. ed. 643, 14 Sup. Ct. Rep. 752.

²⁰United States v. Sauer, 73 Fed. 671.

¹United States v. Collins, 79 Fed. 65; Same v. Tureand, 20 Fed. 621.

²United States v. Ewing, 140 U. S. 144, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; United States v. Patterson, 150 U. S. 67, 37 L. ed. 1000, 14 Sup. Ct. Rep. 20; United States v. Rand, 53 Fed. 350, 3 C. C. A. 556; Hallitt v. United States, 63 Fed. 825; United States v. Dundy, 76 Fed. 356, 22 C. C. A. 219.

State officer may do so.³ The rule as to following State practice applies to all stages of the proceedings before the commissioner or other magistrate,⁴ but not before the district judge on application for removal order.⁵

[c] Powers of arresting and committing officers.

United States commissioners acting under this section are merely committing magistrates,⁷ and have no greater power than a State magistrate.⁸

Incident to their power to arrest and hold to bail they may take the requisite evidence.⁹ They may also adjourn or suspend hearings,¹⁰ and grant continuances of the examination at their discretion,¹¹ but they cannot punish for contempt.¹² Their first duty is to determine the identity of the accused.¹³ Bail should be taken if the offense is bailable.¹⁴ It may be taken after an indictment is found against the prisoner as well as before.¹⁵ The district attorney has no authority to take the commissioner's warrant from the marshal, in order to determine whether it should be executed.¹⁶ The commissioners may hold the accused or discharge him, according to the evidence introduced, but their actions are not a bar to further proceedings.¹⁷ They should in all cases transmit to the judge who has cognizance of the offense a statement of the proceedings had before them, and if the prisoner admits his identity, this fact should be certified to the judge.¹⁹ The record certified by the commissioner should include all the evidence heard, all papers considered, and a statement of the decision reached.²⁰

[d] Arrest.

A warrant of arrest cannot issue but upon probable cause supported by oath or affirmation.⁴ Where however there is probable cause supported by oath of the complainant it is the duty of the magistrate to issue the

³United States v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208; United States v. Evans, 2 Fed. 147, 2 Flip. 605.

⁴United States v. Sauer, 73 Fed. 674; United States v. Insley, 54 Fed. 223, 4 C. C. A. 296.

⁵Tinsley v. Treat, 204 U. S. —, 51 L. ed. — (Adv. op. page 431.)

⁷United States v. Martin, 17 Fed. 150, 9 Sawy. 90.

⁸United States v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; Ex parte Kaine, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598.

⁹United States v. Smith, 17 Fed. 511.

¹⁰United States v. Ewing, 140 U. S. 142, 35 L. ed. 388, 11 Sup. Ct. Rep. 743; United States v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208.

¹¹Rice v. Ames, 180 U. S. 377, 45 L. ed. 583, 21 Sup. Ct. Rep. 406.

¹²Ex parte Perkins, 29 Fed. 910; In re Mason, 43 Fed. 510.

¹³United States v. Yarborough, 122 Fed. 296.

¹⁴Idem; United States v. Dunbar. 83 Fed. 151, 27 C. C. A. 488.

¹⁵Hoeffner v. United States, 87 Fed. 185, 30 C. C. A. 610.

¹⁶United States v. Scroggins, 3 Woods, 529, Fed. Cas. No. 16,244.

¹⁷In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151.

¹⁹United States v. Yarborough, 122 Fed. 298.

²⁰Idem.

⁴⁴th Amendment, U. S. Const. Sec. ante § 1508.

warrant⁵ which may be applied for by anyone.⁶ The warrant is sufficient if it sets forth the complaint in general terms. It need not recite all the acts alleged to have been done by the defendant to constitute the offense.⁷ Where the signature of the magistrate is in pencil the warrant has been held void.⁸ A warrant will not issue to arrest an officer while his conduct is under investigation by a naval board of inquiry regularly organized.⁹ Where the accused is a corporation the court in the absence of statutory provision, obtains jurisdiction over it by any appropriate writ.¹⁰

[e] Commitment.

In States where the use of State prisons is not allowed to the Federal government, the marshal may procure a convenient place to serve as temporary jail,¹¹ and in such cases no special process of commitment is necessary, the prisoners being in the custody of the marshal, and their detention being a continuation of that custody.¹² Where, however, the committing of Federal prisoners to State jails is authorized, the principle that the custody of the jailer is not the custody of the marshal applies,¹³ and the court may issue a warrant of commitment.¹⁴ A copy of such warrant must be delivered to the sheriff or jailer as his authority to hold the prisoner.¹⁵ A writ of commitment may also be issued on sending a prisoner to jail to await examination, provided an examination cannot be had at once.¹⁶ Examination, however, should be held within twenty-four hours unless special cause be shown.¹⁷ Whether or not a warrant of commitment is necessary apparently depends on the mode of process of the particular State, since the above section provides that the proceedings shall be agreeably "to the usual mode" of such State.¹⁸ It has been held that every warrant of commitment must show sufficient cause on its face to justify the jailer in holding the prisoner,¹ and that it must be under seal.²

⁵McDermott v. United States, 40 Fed. 220; United States v. Bollman, 1 Cr. C. C. 373, Fed. Cas. No. 14,622; United States v. Skinner, 2 Wheel. C. C. 232, Fed. Cas. No. 16,309.

⁶United States v. Skinner, 2 Wheel. C. C. 232, Fed. Cas. No. 16,309.

⁷United States v. Green, 136 Fed. 618.

⁸United States v. Thompson, 2 Cr. C. C. 409, Fed. Cas. No. 16,484.

⁹United States v. Mackenzie, 1 N. Y. Leg. Obs. 227, Fed. Cas. No. 15,690.

¹⁰United States v. John Kelso Co. 86 Fed. 304.

¹¹See post, § 1611.

¹²Erwin v. United States, 37 Fed. 485, 2 L.R.A. 229. See also Turner v. United States, 19 Ct. Cl. 629.

¹³Randolph v. Donaldson, 9 Cranch, 76, 3 L. ed. 662.

¹⁴See Erwin v. United States, 37 Fed. 485, 2 L.R.A. 229.

¹⁵R. S. 1028, see post §§ 1609-1613; United States v. Harden, 10 Fed. 807, 4 Hughes, 455.

¹⁶United States v. Harden, 10 Fed. 805, 4 Hughes, 455; United States v. Worms, 4 Blatchf. 332, Fed. Cas. No. 16,765. See also, Erwin v. United States, 37 Fed. 485, 2 L.R.A. 229.

¹⁷United States v. Worms, 4 Blatchf. 332, Fed. Cas. No. 16,765.

¹⁸See United States v. Harden, 10 Fed. 805, 4 Hughes, 455.

¹Ex parte Buford, 3 Cranch, 448, 2 L. ed. 495; Ex parte Bennett, 2 Cr. C. C. 612, Fed. Cas. No. 1,311; United States v. Brown, 4 Cr. C. C. 333, Fed. Cas. No. 14,659; Ex parte Williams, 4 Cr. C. C. 343, Fed. Cas. No. 17,699. See Erwin v. United States, 37 Fed. 486, 2 L.R.A. 229.

²Ex parte Sprout, 1 Cr. C. C. 424, Fed. Cas. No. 13,267; Ex parte Bennett, 2 Cr. C. C. 612, Fed. Cas. No. 1,311.

However it is now authoritatively settled that a commissioner's warrant of arrest, and, inferentially, his commitment, need not be under seal.³

[f] Right of removal in general.

A person in one district wanted for trial in another should be arrested on warrant issued in the district where found, in the following cases: (1) where an indictment has been found in the other district; (2) where on examining trial he has been held over by the committing magistrate in the other district; (3) where a bench warrant has been issued for his arrest in a Federal court of another district; (4) where a verified complaint of an offense committed by him in another district has been made before a judge or committing magistrate in such other district; (5) where such verified complaint is made before such officer in the district where the accused is found.⁶ It is not necessary, except in the first class of cases, that an indictment shall have been found.⁷ A person cannot be moved to another district for any other purpose than for trial.⁸ Hence a removal has been disallowed when sought in order that the prisoner might be arrested, and imprisoned in another district until he obeyed a civil order of the court.⁹ Likewise it is held that a prisoner arrested for a misdemeanor cannot be removed to another district for trial for treason.¹⁰ Nor can one accused of a capital offense be sent to another tribunal for trial for a minor offense.¹¹ A State court having acquired jurisdiction may hold a prisoner, to the exclusion of the Federal courts, until its jurisdiction is exhausted.¹² Removal will not be allowed where the accused cannot be constitutionally tried in the court to which removal is sought.¹³

[g] Arrest and commitment and necessity therefor.

Before a judge can be asked to order removal there must first have been an arrest and commitment by some committing magistrate.¹⁵ Whether an arrest can be made on warrant issued in another district is questionable,¹⁶ and the better practice clearly is to obtain a warrant in the district where accused is found.¹⁷ It has been held, however, that a warrant may

³Todd v. United States 153 U. S. 283, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

⁶United States v. Yarborough, 122 Fed. 295.

⁷Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162; Greene v. Henkel, 183 U. S. 260, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

⁸In re Christian, 82 Fed. 888.

⁹In re Graves, 29 Fed. 60. But see In re Ellerbe, 13 Fed. 530, 4 McCrary, 449; Fanshawe v. Tracey, 4 Biss. 490, Fed. Cas. No. 4,643.

¹⁰United States v. Burr, 2 Burrs Trials, 455, Fed. Cas. No. 14,694.

¹¹United States v. Corrie, Brunner Col. C. 686, Fed. Cas. No. 14,869.

¹²In re James, 18 Fed. 853.

¹³In re Dana, 7 Ben. 1, Fed. Cas. No. 3,554; In re Cross, 20 Fed. 824.

¹⁵United States v. Yarborough, 122 Fed. 293; In re Bailey, 1 Woolw. 422, Fed. Cas. No. 730; In re Graves, 29 Fed. 66; United States v. Jacobi, 1 Flipp. 108, Fed. Cas. No. 15,460. But see United States v. Harris, Fed. Cas. No. 15,313.

¹⁶See In re Graves, 29 Fed. 60; In re Alexander, 1 Low. 530, Fed. Cas. No. 162; United States v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15,322; United States v. Pope, Fed. Cas. No. 16,069.

¹⁷United States v. Yarborough, 122 Fed. 205.

be issued on affidavit made before some other magistrate, even out of the jurisdiction.¹⁸ The constitutional requirement as to probable cause¹⁹ is satisfied by indictment or by bench warrant, or by production of a verified complaint before a committing magistrate of some other district, or by a record showing that such magistrate had previously held the accused over to stand trial.²⁰ Under the practice in some States the production of an indictment or copy thereof properly certified has been held to justify the issue of warrant without any further oath or affirmation.¹ Elsewhere a sworn complaint based upon such an indictment has been sued out.² Likewise a record showing that the accused has been arrested on verified complaint and held for trial by a magistrate of another district may obviate the necessity of another oath in the district where the accused is found.³ So also an original or certified copy of a bench warrant, or verified complaint made before foreign magistrate, has been held to need no further oath.⁴

[h] —power and duty of committing magistrate.

It is always preferable that commitment for removal should be sought through the nearest United States commissioner.⁶ In all cases of arrest for commitment and removal it is undoubtedly the committing magistrate's duty to inquire into the identity of the person arrested, with the person accused, and to pass upon applications for bail.⁷ So also the magistrate should be reasonably satisfied that the indictment or charge preferred in the district seeking the removal, states an offense against the United States;⁸ and that it is an offense committed or triable in the district to which the removal is sought;^{8½} and that it has not outlawed; and is not equally triable in the district where the accused is found.⁹ What further inquiries should take place depends largely upon whether the arrested person is elsewhere indicted, or has been elsewhere committed, after preliminary hearing, or whether bench warrant has issued for him in another district, or there has merely been a complaint sworn out against him elsewhere. It sometimes depends also upon whether the government or the accused is desirous

¹⁸Ex parte Bollman, 4 Cranch, 129, 2 L. ed. 554; In re Kaine, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598; In re Metzger, 5 N. Y. Leg. Obs. 83, Fed. Cas. No. 9,511.

¹⁹U. S. Const., 4th Amendment. See ante, § 1508.

²⁰United States v. Yarborough, 122 Fed. 296.

¹United States v. Yarborough, 122 Fed. 296.

²See Green v. Henkel, 183 U. S. 257, 46 L. ed. 188, 22 Sup. Ct. Rep. 218, where complaint was sworn out.

³United States v. Yarborough, 122 Fed. 296.

⁴United States v. Yarborough, 122 Fed. 296.

⁶United States v. Yarborough, 122 Fed. 293.

⁷United States v. Yarborough, 122 Fed. 293.

⁸In re Benson, 131 Fed. 969, holding that technical objections to the indictment will not be considered: See also in re Benson, 130 Fed. 486.

^{8½}Tinsley v. Treat, 204 U. S. — 51 L. ed. (Adv. op. page 430.)

⁹United States v. Yarborough, 122 Fed. 293; In re Dana, 68 Fed. 889; Green v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; In re Doig, 4 Fed. 193; United States v. Brawner, 7 Fed. 86; In re Terrell, 51 Fed. 213; United States v. Lee, 84 Fed. 626.

of offering further evidence than of the fact of accusation elsewhere; and is perhaps controlled by the local law. If there is merely a sworn complaint against the accused elsewhere and he desires to show a want of probable cause to believe him guilty, and does so, the government must furnish further evidence of probable guilt.¹⁰ Where the removal is sought because a bench warrant has issued for, or indictment has been returned against, the accused in another district or he has been held to answer after preliminary examination elsewhere, it has been held in a Virginia district that proof of either of such contingencies is sufficient to show probable cause and to warrant commitment without proof aliunde.¹¹ Indictment is *prima facie* but not conclusive evidence of probable cause.¹² It may be overthrown by proof to the contrary.¹⁴ In those States where evidence to the contrary is admissible before the committing magistrate, it is admissible before the Federal commissioner.¹⁵ It is proper before the district judge when the removal order is sought even where not proper before the committing magistrate under the State law.¹⁶ The government is not obliged to rest exclusively upon an indictment found; and is not precluded from giving evidence of a certain and definite character concerning the commission of the offense by the defendant, in regard to acts, times and circumstances less minutely stated in the indictment.¹⁷ In other words, defects in the indictment may be supplied by evidence produced at the commitment proceedings, remedying the defects and showing probable cause.¹⁸ The Supreme Court has also decided that where the indictment proved is regular on its face, the commissioner or other committing magistrate is not compelled nor is he justified in going behind it for the purpose of inquiring as to the regularity of the drawing of grand jury which returned it.¹⁹ The proper place for such a defense or for objections for uncertainty, etc., is in the court having jurisdiction to try the indictment.²⁰

[i] — power and duty of district judge after commitment.

After commitment has been had the proper course is to apply thereupon to the district judge for an order for removal. The District of Columbia is

¹⁰United States v. Yarborough, 122 Fed. 297. See also, United States v. Smith, 17 Fed. 511; In re Burkhardt, 33 Fed. 26.

¹¹United States v. Yarborough, 122 Fed. 293. See also, United States v. Shepherd, 1 Abb. U. S. 431, Fed. Cas. No. 16,273; United States v. Haskins, 3 Sawyer, 262, Fed. Cas. No. 15,322; In re Belknap, 96 Fed. 614; Ex parte Alexander, 1 Low. 530, Fed. Cas. No. 162.

¹²Tinsley v. Treat, 204 U. S. — 51 L. ed. (Adv. op. page 433.)

¹⁴See United States v. Fowkes, 49 Fed. 50; 53 Fed. 13, 3 C. C. A. 394; In re Wolf, 27 Fed. 606, 608; United States v. Rogers, 23 Fed. 661, 663.

¹⁵See United States v. Green, 100 Fed. 942, and cases cited; In re Dana, 68 Fed. 893; Price's Case, 83 Fed. 830; United States v. Price, 84 Fed. 636; Price v. McCarty, 89 Fed. 84, 87, 32 C. C. A. 162; In re Wood, 95 Fed. 288.

¹⁶Tinsley v. Treat, 204 U. S. — 51 L. ed. — (Adv. op. p. 430.)

¹⁷Green v. Henkel, 183 U. S. 260, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

¹⁸Green v. Henkel, 183 U. S. 260, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

¹⁹Green v. Henkel, 183 U. S. 262, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

²⁰Hyde v. Shine, 199 U. S. 83, 50 L. ed. 97, and cases cited.

a Federal district and its court a Federal court, within the meaning of the above provision authorizing removal.¹ The accused is entitled to notice of removal application and if he so desires may be brought before the judge for the purpose of presenting any objections which he may have to the making of the order.² The notice must be reasonable so that he may employ counsel if he so desires,³ and should state the time and place of the application.⁴ In some districts the judge will refuse to make a removal order after commitment unless the application is accompanied by a copy of the indictment.⁵ The requirement of conformity to State procedure does not apply to the proceeding before the judge for the removal order and he acts judicially and not ministerially.^{5½}

It would seem that the various questions and inquiries open for investigation by the commissioner making the commitment and already discussed⁶ are open also to the district judge on application for the removal order. The crime must be one against the United States, and the district court may look into the indictment, where one has been found, to see whether the accused is charged with such offense and whether the court to which a removal is sought has jurisdiction.⁸ Hence the court may refuse to order removal where the indictment shows that the offense was not committed within the jurisdiction where it was found.⁹ In such case even the consent of the prisoner will not justify removal.¹⁰ If the indictment is bad in substance¹¹ or misrecites the offense,¹² or recites an impossible offense,¹³ removal will be refused. Defects in the form of the indictment do not prevent removal, as these may be properly left to the disposition of the court where the offender is to be tried.¹⁴ The indictment is a prima facie showing that the crime has been committed at the place alleged.¹⁵ Upon the question of probable cause the indictment is sufficient to sustain a

¹Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90.

²In re Beshears, 79 Fed. 70; United States v. Yarborough, 122 Fed. 298.

³United States v. Yarborough, 122 Fed. 298.

⁴Idem.

⁵United States v. Price, 84 Fed. 636; United States v. White, 25 Fed. 716.

^{5½}Tinsley v. Treat, 204 U. S. — 51 L. ed. (Adv. op. p. 431.)

⁶Supra, note (b).

⁸In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; In re Doig, 4 Fed. 193; United States v. Horner, 44 Fed. 677; In re Corning, 51 Fed. 205; In re Greene, 52 Fed. 106; United States v. Lee, 84 Fed. 626; In re Belknap, 96 Fed. 614; Tinsley v. Treat, 204 U. S. —, 51 L. ed. (Adv. op. p. 432.)

⁹In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; United States v. Lee, 84 Fed. 626; In re Belknap, 96 Fed. 614; Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162; In re Corning, 51 Fed. 205.

¹⁰United States v. Connors, 111 Fed. 734.

¹¹In re Huntington, 68 Fed. 882.

¹²In re Richter, 100 Fed. 295.

¹³United States v. Pope, 24 Rev. Rec. 29, Fed. Cas. No. 16,069.

¹⁴United States v. Horner, 44 Fed. 677; Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162. See also, United States v. Yennie, 74 Fed. 221; In re Benson, 130 Fed. 486; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90.

¹⁵United States v. Fowkes, 53 Fed. 13, 3 C. C. A. 394. See also Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; United States v. Rogers, 23 Fed. 658; Tinsley v. Treat, 204 U. S. —, 51 L. ed. (Adv. op. page 433.)

removal order in the absence of a contradictory showing.¹⁶ But evidence in refutation may be introduced.¹⁷ The accused is entitled to have the judgment of the district judge as to the existence of probable cause, in the light of all the relevant evidence he may adduce.^{17½} A person under custody in one Federal district may with the consent of the court thereof, be removed to another for trial on another charge.¹⁸

[j] Review of removal order.

Where order of removal issues it is reviewable only on habeas corpus. The inquiry is whether the judge making the order had jurisdiction and not whether upon the merits he ought to have made it.¹ Where neither indictment nor evidence shows an offense against the United States, or the offense was not committed or triable in the district to which removal is sought, there is a want of jurisdiction warranting relief on habeas corpus.² And, conversely, if there is competent evidence of an offense against the United States and of the identity of the accused and probable cause to believe him guilty, habeas corpus will not lie on that ground.³ If the district judge and commissioner refuse relevant evidence offered to rebut the prima facie showing of an indictment, the Supreme Court will vacate the order of removal on habeas corpus;⁴ But not if he or the commissioner receive the evidence, and order removal after weighing it.^{4½}

[k] — right to discharge on denial of removal warrant.

On denial of application for removal, the proper course is to discharge the accused.⁵ The power of the district judge thus to order a discharge, upon denying the application is said to be a necessary implication from this section.⁶

§ 1538. — to be taken before nearest officer for hearing—complaint to be attached to warrant.

It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for

¹⁶In re Alexander, 1 Low. Dec. 530, Fed. Cas. No. 162. See cases cited under [b] supra.

¹⁷In re Terrell, 51 Fed. 214; In re Wolf, 27 Fed. 606; United States v. Fowkes, 49 Fed. 50, 53 Fed. 13, 3 C. C. A. 394; In re Dana, 68 Fed. 891 and cases cited. Refusal to admit such evidence is available on habeas corpus; Tinsley v. Treat, 204 U. S. —, 51 L. ed. — (Adv. op. p. 430.)

^{17½}Tinsley v. Treat, 204 U. S. —, 51 L. ed. (Adv. op. p. 433.)

¹⁸Beavers v. Haubert, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

¹Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218.

²Horner v. United States, 143 U. S. 214, 36 L. ed. 130, 12 Sup. Ct. Rep. 407; Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; In re Greene, 52 Fed. 104.

³Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; United States v. Lantry, 30 Fed. 233.

⁴Tinsley v. Treat, 204 U. S. —, 51 L. ed. — (Adv. op. p. 430.)

^{4½}Hyde v. Shine, 199 U. S. 84, 85, 50 L. ed. 97, 98.

⁵In re Corning, 51 Fed. 205; United States v. Lee, 84 Fed. 626; United States v. Karlin, 85 Fed. 963; In re Wood, 95 Fed. 288. See also In re James, 18 Fed. 853; In re Dana, 68 Fed. 887, 904.

⁶United States v. Lee, 84 Fed. 626; United States v. Brawner, 7 Fed. 88.

a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

Part of § 1, act August 18, 1894, c. 301, 28 Stat. 416, U. S. Comp. Stat. 1901, p. 717.

The above was a proviso annexed to a sundry civil appropriation act. United States commissioners now discharge the functions of the circuit court commissioners mentioned in this section.⁸

§ 1539. Removal of bankrupt from one district to another.

Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

§ 10 of act July 1, 1898, c. 541, 30 Stat. 549, U. S. Comp. Stat. 1901, p. 3426.

The foregoing is from the bankruptcy act of 1898.

§ 1540. Removal of offenders to and from the Philippine Islands.

The provisions of section ten hundred and fourteen of the Revised Statutes,¹⁰ so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States. Such fugitive may, by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and imprisoned, or bailed, as the case may be, pending the issuance of a warrant for his removal to the United States, which warrant it shall be the duty of a judge of the court of first instance seasonably to issue, and of the officer or agent of the United States designated for the purpose to execute. Such officer or agent, when en-

⁸Ante, § 672.

¹⁰Ante, § 1539.

gaged in executing such warrant without the Philippine Islands, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safe-keeping and the execution of the warrant.

Act February 9, 1903, c. 529, 32 Stat. 806, U. S. Comp. Stat. 1905, p. 164.

§ 1541. Arrest and bail of persons found operating illicit distillery.

Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes,¹² who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen¹³ of the said Revised Statutes.

§ 9, act March 1, 1879, c. 125, 20 Stat. 341, U. S. Comp. Stat. 1901, p. 718.

§ 1542. United States commissioners may arrest for internal revenue violations.

Warrants of arrest for violations of internal revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector or deputy collector of internal revenue, or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney.

Part of § 19, act May 28, 1896, c. 252, 29 Stat. 184, U. S. Comp. Stat. 1901, p. 717.

§ 1543. Excessive bail prohibited.

Excessive bail shall not be required.

Part of 8th Amendment, U. S. Constitution.

The amendment is given in full in a subsequent chapter of this Code.¹⁴

¹²Ante, § 1537.

¹⁴See post, § 1608.

¹³Post §§ 1544, 1545.

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It is a limitation upon the Federal government and not upon the States.¹⁵ to require more bail than the defendant can give has been held a requirement of excessive bail.¹⁶

§ 1544. Bail admitted in cases not capital.

Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section¹⁶ to arrest and imprison offenders.^{[a]-[c]}

R. S. § 1015, U. S. Comp. Stat. 1901, p. 718.

[a] Bail, when allowed—power to take.

Under the above section bail may be admitted by a commissioner upon all arrests in criminal cases where the offense is not punishable by death.¹⁹ The Federal laws proceed upon the theory of permitting bail until the accused has been adjudged guilty by a court of last resort.²⁰ The power is allowed under the section only in cases of violations of United States laws¹ and is limited to the taking of security for the appearance of the accused at the time and place set for trial, and not for the appearance from day to day.² It applies only to bail before conviction.³ Although a party has forfeited his right to bail by absconding he may still be let to bail if there be a delay in the trial.⁴ He may, however, be required to give additional security,⁵ and cannot demand bail as a matter of right.⁶ While bail cannot be ordinarily granted in extradition cases it cannot be said that the circuit court may not under special circumstances extend that relief.⁷ It has been granted also in Chinese deportation cases.⁸ The court cannot grant bail in a case without power to do so by law.⁹ It has been held that a justice of the peace has no power to admit to bail after commitment.¹⁰ A commissioner may release on bail at any time before warrant of removal.¹¹ It has been held, however, that a commis-

¹⁵*Pervear v. Commonwealth*, 5 Wall. 480, 18 L. ed. 610. See also, *Spies v. Illinois*, 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21, 22.

¹⁶*United States v. Lawrence*, 4 Cr. C. C. 518, Fed. Cas. No. 15,577.

¹⁸*Ante*, § 1537.

¹⁹*United States v. Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. 615.

²⁰*Hudson v. Parker*, 156 U. S. 285, 39 L. ed. 424, 15 Sup. Ct. Rep. 450.

¹*United States v. Hand*, 6 McLean, 274, Fed. Cas. No. 15,296; *Rice v. Ames*, 180 U. S. 377, 45 L. ed. 582, 21 Sup. Ct. Rep. 406. See also, *Wright v. Henkel*, 190 U. S. 62, 47 L. ed. 956, 23 Sup. Ct. Rep. 781.

²*United States v. Case*, 8 Blatchf. 250, Fed. Cas. No. 14,742.

³*Hudson v. Parker*, 156 U. S. 285, 39 L. ed. 427, 15 Sup. Ct. Rep. 450.

⁴*United States v. Lee*, 6 Phila. 96, Fed. Cas. No. 8,180.

⁵*United States v. Feely*, 1 Brock. 255, Fed. Cas. No. 15,082.

⁶*United States v. Lee*, 6 Phila. 96, Fed. Cas. No. 8,180.

⁷*Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781.

⁸*In re Ah Tai*, 125 Fed. 797.

⁹*United States v. Hudson*, 65 Fed. 68.

¹⁰*United States v. Faw*, 1 Cr. C. C. 486, Fed. Cas. No. 15,078.

¹¹*United States v. Volz*, 14 Blatchf. 15, Fed. Cas. No. 16,627.

sioner has no power to take a recognizance for the appearance before himself at a future day, of a person charged with a crime against the United States.¹²

[b] Recognizance or bail bond.

The omission in the undertaking to set forth that the defendant had been indicted or ordered admitted to bail is not fatal.¹⁴ It is held sufficient if it sets forth an offense punishable under the United States laws without stating particulars.¹⁵ Where the examining magistrate acts within his jurisdiction an order requiring bail and a bail bond are not void although the magistrate may have erred in judgment as to law and fact.¹⁶ Hence it is no defense in a bail bond that the information or indictment was defective or described no offense.¹⁷ The form of the bail bond should substantially conform to the requirements of the law of the State where the magistrate is sitting.¹⁸ It is held, however, that it need not show on its face the authority of the commissioner to take it, or that he had jurisdiction.¹⁹ In enforcing a forfeited bond the government is not subject to the restrictions of the State law.¹ The undertaking is valid although not signed by the parties.² The signature at a subsequent time does not make one a party thereto whose name does not appear in the body of the instrument.³ A single recognizance for a total amount is void where separate recognizances are required.⁴ It is not necessary that an ordinary bail bond be signed in the presence of the court. It apparently may be taken and acknowledged by the clerk of the district court duly authorized by the judge.⁵ If there is no authorization shown it is presumed to be taken under the immediate direction of the court.⁶ It is held in an early case that money cannot be taken in lieu of a bail bond.⁷

[c] Liability on bail bond.

When the defendant fails to appear and the bond is duly estreated, the United States acquire a perfect cause of action against the surety, en-

¹²United States v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742.

¹⁴United States v. Dunbar, 83 Fed. 151, 27 C. C. A. 488.

¹⁵United States v. Dennis, 1 Bond, 103, Fed. Cas. No. 14, 949.

¹⁶United States v. Reese, 4 Sawy. 629, Fed. Cas. No. 16,138.

¹⁷United States v. Reese, 4 Sawy. 629, Fed. Cas. No. 16,138; United States v. Evans, 2 Fed. 147, 2 Flip. 605; United States v. Stein, 13 Blatchf. 127, Fed. Cas. No. 16,403; Hardy v. United States, 71 Fed. 158, 18 C. C. A. 22.

¹⁸United States v. Insley, 54 Fed. 221, 4 C. C. A. 296.

¹⁹United States v. George, 3 Dill.

431, Fed. Cas. No. 15,199; United States v. De Grieff, 10 Reporter, 258, Fed. Cas. No. 14,935a; United States v. Atwill, Fed. Cas. No. 14,475.

¹United States v. Insley, 54 Fed. 221, 4 C. C. A. 296.

²United States v. Pickett, 1 Bond, 123, Fed. Cas. No. 16,043.

³Idem.

⁴United States v. Goldstein, 1 Dill. 413, Fed. Cas. No. 15,226.

⁵Hunt v. United States, 63 Fed. 569, 11 C. C. A. 340; Hunt v. United States, 61 Fed. 795, 10 C. C. A. 74.

⁶United States v. Evans, 2 Fed. 147, 2 Flip. 605.

⁷United States v. Faw, 1 Cr. C. C. 486, Fed. Cas. No. 15,078.

forceable in the proper forum upon due notice.⁹ Where, however, the surety resides in another district and remains in such district his personal liability on the bond cannot be established in any other place¹⁰ and two returns nihil to a writ of certiorari in the district in which the bond is filed is not equivalent to personal service on such surety in the district of his residence.¹¹

An agreement to continue the case for an indefinite time discharges the bail.¹² So also the bail is discharged by an agreement postponing the appearance of the defendant.¹³ Likewise an agreement between the government and the defendant which allows the latter to leave the country, works a release.¹⁴ Where the defendant forfeits his recognizance a motion in arrest of judgment will not be heard until he appears and submits to the jurisdiction.¹⁵ The death of the defendant after default will not exonerate the bail;¹⁶ nor will the subsequent conviction and imprisonment of the defendant under State laws;¹⁷ nor conviction and imprisonment by the authorities of a State to which a person out on bail is surrendered upon requisition by a State to which he has gone.¹⁸ Interest cannot be recovered on the bail bond, nor any amount in excess of the penalty and costs.¹⁹ The sureties have no right of action against the accused for the amount of forfeited bail, in the absence of express contract;²⁰ and no right to subrogation to the rights of the United States as provided by R. S. § 3468, respecting the sureties on other bonds to the government.¹

§ 1545. Bail in capital cases.

Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law.

R. S. § 1016, U. S. Comp. Stat. 1901, p. 718.

⁹Kirk v. United States, 124 Fed. ed States v. Erskine, 4 Cr. C. C. 499, 324; Kirk v. United States, 137 Fed. Fed. Cas. No. 15,057.
754.

¹⁰Kirk v. United States, 137 Fed. Dill. 406, Fed. Cas. No. 16,607.
754.

¹¹Kirk v. United States, 137 Fed. ¹⁷Idem.
754. See also, Kirk v. United States, 21 L. ed. 287.
124 Fed. 324.

¹²Reese v. United States 9 Wall. ¹⁸United States v. Brodhead, 127 U. S. 213, 32 L. ed. 147, 8 Sup. Ct. Rep. 1191.
13, 19 L. ed. 541.

¹³United States v. Backland, 33 ²⁰United States v. Ryder, 110 U. S. 737, 28 L. ed. 308, 4 Sup. Ct. Rep. 196.
Fed. 157.

¹⁴Reese v. United States, 9 Wall. ¹United States v. Ryder, 110 U. S. 739, 28 L. ed. 308, 4 Sup. Ct. Rep. 196.
13, 19 L. ed. 541.

¹⁵United States v. Askins, 4 Cr. 739, 28 L. ed. 308, 4 Sup. Ct. Rep. 196.
C. C. 98, Fed. Cas. No. 14,471; Unit-

A court possessing the power to bail prisoners not committed by itself may award a writ of habeas corpus for the exercise of that power.³

§ 1546. Bail on appeal to Supreme Court from highest State court.

When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error.

R. S. § 1017, U. S. Comp. Stat. 1901, p. 718.

The jurisdiction of the Supreme Court on error to State courts is considered elsewhere.⁵

§ 1547. Bail on appeal to Supreme Court from circuit and district courts.

Where such writ of error [i. e., from a circuit or district court to the Supreme Court under sections 5 and 6 of circuit court of appeals act of 1891⁷] is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court, or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Clause 2 of Supreme Court Rule 36, promulgated May 11, 1891.

The Supreme Court promulgated Rule 36 upon the day the opinion in *In re Claasen*⁸ was handed down, and set at rest some questions raised in that case. That decision and the rule virtually serve to explain each other.⁹ The Supreme Court has since held that the power to admit to bail may be exercised by another Supreme Court justice than the one assigned to the particular circuit and one not strictly speaking a justice or judge of the circuit or district court from which the appeal is taken.¹⁰

³Ex parte Bollman, 4 Cranch, 75.
²L. ed. 554.

⁵Ante, § 38.

⁷Ante, § 42.

⁸140 U. S. 200, 35 L. ed. 409.

⁹Hudson v. Parker, 156 U. S. 284,
39 L. ed. 426, 15 Sup. Ct. Rep. 450.

¹⁰Ibid.

§ 1548. — on appeal to circuit court of appeals.

In several circuits rules have been framed to cover the same ground as rule 36 of the Supreme Court and provide for the letting to bail after conviction below and pending the appeal. The practitioner should advise himself as to the existence of such a rule in any particular circuit.

Author's section.

On March 2, 1897, such a rule was promulgated for the sixth circuit.¹² On February 27, 1897, a similar rule was adopted in the eighth circuit.¹³ And on June 11, 1897, in the fifth circuit.¹⁴ In the first circuit there is an amendatory order of similar import.¹⁵ The power of the circuit courts of appeal to make such rules would seem to be clear.¹⁶

§ 1549. Surrender of accused by his bail.

Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneretur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

R. S. § 1018, U. S. Comp. Stat. 1901, p. 719.

The above section was carried into the Revised Statutes from an act of 1846.¹⁸ On bail being given the sureties may at any time thereafter seize their principal and deliver him up.¹⁹ He may be arrested in another State and removed by them.²⁰ Where the principal on his release on bail is arrested by the State authorities the sureties have no right to habeas corpus proceedings, in order to have him delivered to Federal authorities. Where the Federal authorities do not insist on prior jurisdiction the prin-

¹²Rule 38 circuit court of appeals, Hudson v. Parker, 156 U. S. 292, sixth circuit. See 78 Fed. cvii; 90 39 L. ed. 424, 15 Sup. Ct. Rep. 450.

¹³Rule 35 circuit court of appeals, eighth circuit, 78 Fed. cxxx; 90 Fed. cxxx; 31 C. C. A. cxxx.

¹⁴See Rule 37, 90 Fed. xcvi; 31 C. C. A. xcvi.

¹⁵See 90 Fed. lx; 31 C. C. A. lx.

¹⁶McKnight v. United States, 113 Fed. 452, 51 C. C. A. 235. Following

Hudson v. Parker, 156 U. S. 292, 39 L. ed. 424, 15 Sup. Ct. Rep. 450.

¹⁸Act Aug. 8, 1846, c. 98, § 4, 9 Stat. 73.

¹⁹In re Grice, 79 Fed. 632; Taylor v. Taintor, 16 Wall. 371, 21 L. ed. 287. See also Cosgrove v. Winney, 174 U. S. 68, 43 L. ed. 899, 19 Sup. Ct. Rep. 598.

²⁰In re Von Der Ahe, 85 Fed. 962; Taylor v. Taintor, 16 Wall. 371, 21 L. ed. 287.

cipal and sureties cannot complain.¹ The discharge of the sureties should be entered on the record.²

§ 1550. When increased bail required—commitment for want thereof.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.

R. S. § 1019, U. S. Comp. Stat. 1901, p. 719.

The above section was originally enacted in 1846.⁴ Where the bond is in any way insufficient or irregular the commissioner or other committing magistrate may have the defendant arrested under the above section.⁵

§ 1551. When penalty of recognizances may be remitted.

When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.

R. S. § 1020, U. S. Comp. Stat. 1901, p. 719.

The above section was carried into the Revised Statutes from an act of 1839.⁷ The penalty of a recognizances has been remitted where the defendant, though not appearing on the day named, put in an appearance at the same term.⁸ It has been remitted also even where the delay has been prejudicial to the government, if there has been no collusion between the defendant and his sureties.⁹ Sureties also have been released where the defendant, prosecuted for a misdemeanor, departed without leave during

¹In re Fox, 51 Fed. 427.

⁷Act Feb. 28 1839, c. 36, § 6, 5

²United States v. Stevens, 16 Fed. Stat. 322.

101. ⁸United States v. Barger, 20 Fed.

⁴Act Aug. 8, 1846, c. 98, § 6, 9 Stat. 500.

73. ⁹United States v. Duncan, 10

⁵United States v. Ebbs, 49 Fed. Pittsb. L. J. 41, Fed. Cas. No. 15,004.
151.

his trial, the latter resulting in his acquittal.¹⁰ If however there is good reason to believe the accused is guilty default will not be set aside.¹¹ Neither will it be set aside on the ground that the party when called was in custody of a State officer on a criminal charge.¹² The entering of judgment on the recognizance is not final and may be set aside.¹³ When application for relief is made under the above section after there has been a forfeiture of the recognizance it must be addressed to the court which adjudged the forfeiture and in which alone is lodged discretion to grant relief.¹⁴

§ 1552. Special bail in suits for duties and penalties.

In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any State where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required.

R. S. § 942, U. S. Comp. Stat. 1901, p. 693.

It has been held that a civil action is understood to be the usual form for recovering these penalties.¹⁵ Where imprisonment for debt is abolished by the State in certain cases only, it is not abolished within the meaning of the above section.¹⁷ If, when the action is pending, the State legislature abolishes imprisonment for debt the prisoner cannot be required to give special bail, and the sureties on appearance bail may on motion be discharged.¹⁸ Where bail may be demanded the refusal of the defendant to make such demand justifies the marshal in committing him.¹⁹ The above section requires only that the same grounds shall exist for the arrest of a defendant as are necessary for such action in the State court; and not that the necessary papers be verified before the identical officers authorized by such laws to make verification.²⁰

§ 1553. Defendant giving bail in one district committed in another—discharge of bail.

When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district, and is committed

¹⁰United States v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16,222.

¹¹United States v. Mercer, Deady, 502, Fed. Cas. No. 15,758.

¹²United States v. Stricker, 12 Blatchf. 389, Fed. Cas. No. 16,410.

¹³United States v. Duncan, 10 Pittsb. L. J. 41, Fed. Cas. No. 15,004.

¹⁴United States v. McGlashen, 66 Fed. 538.

¹⁵United States v. Elliot, 14 Am. Law Rev. 247, Fed. Cas. No. 15,043.

¹⁷Catherwood v. Gapete, 2 Curt. 94, Fed. Cas. No. 2,513.

¹⁸Gray v. Munroe, 1 McLean, 528, Fed. Cas. No. 5,724.

¹⁹Palmer v. Allen, 7 Cranch, 550, 3 L. ed. 436.

²⁰Fulton v. Gilmore, 2 Flipp. 260, Fed. Cas. No. 5,154.

to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail, or to his attorney, a duplicate thereof. Upon the return of such certificate, the court which made the said order, or any judge thereof, may direct that an exoneration be entered upon the bail piece, where special bail shall have been found, or otherwise discharge such bail.

R. S. § 943, U. S. Comp. Stat. 1901, p. 693.

The above section was originally enacted in 1799,¹ and seems to refer to bail in civil cases.

§ 1554. — such defendant held until judgment and sixty days thereafter.

When a defendant is committed by virtue of the order provided in the preceding section,³ he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is.

R. S. § 944, U. S. Comp. Stat. 1901, p. 694.

The above section was first enacted in 1799.⁴

§ 1555. Bail and affidavits taken by commissioners in civil cases.

Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of

¹Act Mar. 3, 1799, c. 32, § 1, 1 Stat. 727.

³Ante, § 1553.

⁴Act Mar. 2, 1799, c. 32, § 3, 1 Stat. 727.

bail and affidavit shall have the same effect as if taken before any judge of such courts.

R. S. § 945, U. S. Comp. Stat. 1901, p. 694.

The office of circuit court commissioners was abolished by act of 1896 as amended in 1901, and the powers heretofore vested in such commissioners are now vested in United States commissioners.⁵ They are otherwise empowered to administer oaths.⁶ An appeal bond in admiralty may be taken before a United States commissioner in absence of rule of court providing otherwise.⁷ A commissioner may take affidavits in conformity with State laws in civil cases,⁸ but a commissioner in one circuit has been held to have no power to authenticate a stipulation to take effect in another circuit.⁹

§ 1556. Calling of bail in Kentucky.

When a bail bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies.

R. S. § 946, U. S. Comp. Stat. 1901, p. 694.

The above section was carried into the Revised Statutes from an act of 1862.¹¹ Kentucky is now divided into two districts.¹²

§ 1557. When clerks may take recognizances of special bail de bene esse.

Recognizances of special bail may be taken de bene esse by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable.

R. S. § 947, U. S. Comp. Stat. 1901, p. 694.

⁵Ante, § 672.

⁶Ante, § 676.

⁷The Canary, No. 2, 22 Fed. 536.

⁸Fulton v. Gilmore, 2 Flip. 260, 10

Chic. L. N. 108, Fed. Cas. No. 5,154.

⁹Sawyer v. Oakman, 11 Blatchf. 65, Fed. Cas. No. 12,403.

¹¹Act May 15, 1862, c 71, § 10, 12 Stat. 387.

¹²Ante, § 269.

The above section was carried into the Revised Statutes from an act of 1792.¹⁴

§ 1558. Imprisonment for debt.

No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State.

R. S. § 990, U. S. Comp. Stat. 1901, p. 709.

Under the bankruptcy act of 1898¹⁶ the court may imprison bankrupts to compel a surrender of the bankrupt's estate and this power appears to be an exception to the above section.¹⁷ The section applies only to civil cases.¹⁸ Its applicability to cases in which the United States are parties has been questioned.¹⁹ The right to imprison for debt has been greatly restricted in modern practice. The proceedings in all cases of arrest on mesne process must conform to the State law.²⁰ A debtor is not liable to arrest on Federal process unless liable to arrest under the State laws.¹ Hence where a State law does not allow imprisonment for debt after the debtor has surrendered his property, he cannot be arrested on Federal court process.² Where a State law modifies imprisonment for debt the modification is adopted by Federal courts.³ So also where the State law puts restrictions on imprisonment.⁴ A State court however has no authority under a State insolvent law to release from jail one held on bail under a judgment rendered in an action at law by a Federal court.⁵ The above section does not affect the power of the court to issue a warrant of arrest as process for compelling defendants to respond to a claim for unliquidated damages.⁶ But an action for a penalty is a civil action since a penalty

¹⁴Act May 8, 1792, c. 36, § 10, 1 Stat. 278.

¹⁶See post, § 2201.

¹⁷Ripon Knitting Works v. Schreiber, 101 Fed. 816.

¹⁸Low v. Durfee, 5 Fed. 256; In re Sanborn, 52 Fed. 583; United States v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359.

¹⁹United States v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359; United States v. Tetlow, 2 Low. 159, Fed. Cas. No. 16,456.

²⁰In re Bergen, 2 Hughes, 513, Fed. Cas. No. 1,338; Low v. Durfee, 5 Fed. 256.

¹Gray v. Monroe, 1 McLean, 528, Fed. Cas. No. 5,724; Wilber v. Ingersoll, 2 McLean, 322, Fed. Cas. No. 17,632; Mallory Mfg. Co. v. Fox, 20 Fed. 409. See also Nelson, Morris & Co. v. Hill, 89 Fed. 477.

²Moan v. Wilmarth, 3 Wood, & M. 399, Fed. Cas. No. 9,686.

³Low v. Durfee, 5 Fed. 256; United States v. Tetlow, 2 Low. 159, Fed. Cas. No. 16,456. See also Catherwood v. Gapete, 2 Curt. 94, Fed. Cas. No. 2,513.

⁴Stroheim v. Deimel, 73 Fed. 430.

⁵Sadlier v. Fallen, 2 Curt. 190, Fed. Cas. No. 12,209.

⁶Bolden v. Jensen, 69 Fed. 745.

when incurred becomes a debt and a bench warrant will not issue in such a case where the State law prohibits imprisonment for debt.⁷ The limitation is held to apply as well to admiralty courts as to others.⁸ Although it has been held that that portion of the above section which adopted the State law "concerning the modifications, conditions and restrictions upon imprisonment for debt" does not apply to process in admiralty suits.⁹ The papers for the arrest of a debtor may be verified before a Federal commissioner as well as before a State officer.¹⁰

§ 1559. — right and proceedings as to discharge same as in State court.

When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted at may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioner of the circuit court for the district where the defendant is so held.

R. S. § 991, U. S. Comp. Stat. 1901, p. 709.

The powers formerly exercised by circuit court commissioners are vested in United States commissioners.¹² Elsewhere will be found provisions of law for the discharge of debtors imprisoned under judgment in favor of the United States.¹³ This and the previous section contemplate that a defendant shall be subject to imprisonment and discharged therefrom by Federal courts under the same circumstances and in the same way as under State laws.¹⁴ This section does not, however, adopt State laws prospectively.¹⁵ It is obligatory on sheriffs and no discharge from jail under a State law not in conformity therewith will exonerate the sheriff.¹⁶ A prisoner held under Federal process cannot be discharged by a State

⁷United States v. Younger, 92 Fed. 672.

⁸The Kentucky, 4 Blatchf. 448, Fed. Cas. No. 7,717; Louisiana Ins. Co. v. Nickerson, 2 Low. 310, Fed. Cas. No. 8,539; Fry v. Cook, 8 Chic. L. N. 286, 14 Fed. 424, Fed. Cas. No. 5,138; The Blanche Page, 16 Blatchf. 1, Fed. Cas. No. 1,524.

⁹Hanson v. Fowle, 1 Sawy. 497, Fed. Cas. No. 6,041.

¹⁰Fulton v. Gilmore, 2 Flipp. 260, Fed. Cas. No. 5,154.

¹²Ante, § 672.

¹³Post, § 1607.

¹⁴Low v. Durfee, 5 Fed. 256; United States v. Tetlow, 2 Low. 159, Fed. Cas. No. 16,456.

¹⁵In re Freeman, 2 Curt. 491, Fed. Cas. No. 5,083; Campbell v. Hadley, 1 Spr. 470, Fed. Cas. No. 2,358.

¹⁶McNutt v. Bland, 2 How. 9, 11 L. ed. 159.

officer acting under State law.¹⁷ Where, however, the United States sues for a penalty, its judgment can be enforced only by process under State law, and a discharge under a State law will be valid.¹⁸ A discharge under this section cannot be granted without a strict compliance with the State law.¹⁹

§ 1560. — same right to privilege of jail limits.

Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions.

R. S. § 992, U. S. Comp. Stat. 1901, p. 709.

Where a bond is required under the State law for jail limits, the sheriff is bound to take such bond from a prisoner confined under process from a Federal court.¹ The marshal, however, is not liable for the escape of a prisoner whom he has committed to a State jail.²

§ 1561. Penalty for allowing prisoners to escape.

Whenever any marshal, deputy marshal, ministerial officer, or other person, has in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge or commissioner, and such marshal, deputy marshal, ministerial officer, or other person, voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned for a term not more than two years, or both.

R. S. § 5409, U. S. Comp. Stat. 1901, p. 3658.

The above section was originally enacted in 1860.⁴

§ 1562. — applies to prisoners charged as well as convicted.

The preceding section shall be construed to apply not only to

¹⁷McNutt v. Bland, 2 How. 9, 11 L. ed. 159, Bank v. Tyler, 4 Pet. 366, 7 L. ed. 888; Duncan v. Darst, 1 How. 301, 11 L. ed. 139; Catherwood v. Gapete, 2 Curt. 94, Fed. Cas. No. 2,513; In re Hopkins, 2 Curt. 567, Fed. Cas. No. 6,683. See also In re Freeman, 2 Curt. 494, Fed. Cas. No. 5,083.

¹⁸Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341. See also United States v. Tetlow, 2 Low.

159, Fed. Cas. No. 16,456. But see United States v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359.

¹⁹Moran v. Secord, 15 Fed. 509; See also Low v. Durfee, 5 Fed. 256.

¹United States v., Noah, 1 Paine, 368, Fed. Cas. No. 15,894.

²Randolph v. Donaldson, 9 Cranch, 76, 3 L. ed. 662.

⁴Act June 21, 1860, c. 164, 12 Stat.

cases in which the prisoner who escaped was charged or found guilty of an offense against the laws of the United States, but also to cases in which a prisoner may be in custody charged with offenses against any foreign government with which the United States have treaties of extradition.

R. S. § 5410, U. S. Comp. Stat. 1901, p. 3659.

The above section was first enacted in 1860.⁵

⁵Act June 21, 1860, c. 164, 12 Stat. 69.

CHAPTER 48.

CRIMINAL PROCEDURE IN GENERAL]

- § 1570. Constitutional guaranty as to trial and place thereof, etc.
- § 1571. Presentment or indictment when required—double jeopardy—
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- § 1572. Twelve grand jurors must concur in indictment.
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- § 1576. —for subornation of perjury.
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- § 1579. Defects in form disregarded.
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- § 1581. One warrant sufficient on several indictments or charges against
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- § 1582. Copy of writ, warrant or mittimus for jailer—original to be re-
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- § 1583. Writ for removal of prisoner from one district to another.
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- § 1585. Standing mute equivalent to plea of not guilty.
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- § 1588. Verdict may be for lesser offense than charged.
- § 1589. —may be against some of several joint defendants.
- § 1590. When indictment transferred from district to circuit court and
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- § 1591. —in cases involving difficult questions of law.
- § 1592. —all capital cases remitted to circuit court.
- § 1593. Power to hold to security for peace and good behavior.
- § 1594. Punishment of offenses committed in places not ceded to United
States.
- § 1595. —later provision of act of 1898.
- § 1596. Continuances grantable in internal revenue prosecutions.

- § 1570. Constitutional guaranty as to trial and place thereof, etc.
In all criminal prosecutions, the accused shall enjoy the right to
a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

Sixth Amendment, U. S. Constitution.

Portions of this amendment are also given elsewhere.¹

§ 1571. Presentment or indictment when required—double jeopardy—accused as witness against himself.

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;^{[a]-[b]} nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;^[c] nor shall be compelled in any criminal case to be a witness against himself;² nor be deprived of life, liberty, or property, without due process of law;^[d] nor shall private property be taken for public use, without just compensation.

Fifth Amendment, U. S. Constitution.

[a] Amendment applies only to Federal proceedings.

It is well established that this amendment is a restraint on the power of the general government, and not applicable to the States.³ It is applicable to the organized territories of the United States,⁴ but not necessarily to territory to which the Constitution has never formally been extended by Congress.⁵

[b] Presentment or indictment before grand jury.

As to offenses not capital or infamous there is no restriction upon Congress as to mode of procedure.⁷ Only those cases arising in land and naval

¹See post, §§ 1700, 1739.

²See post, § 1738.

³Barrow v. Mayor, etc. Baltimore, 7 Pet. 247, 8 L. ed. 672; Holmes v. Jennison, 14 Pet. 587, 10 L. ed. 602; Fox v. State, 5 How. 434, 12 L. ed. 224; Withers v. Buckley, 20 How. 90, 15 L. ed. 819; Twitchell v. Commonwealth, 7 Wall. 325, 19 L. ed. 224; Spies v. Illinois, 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21, 22; Hallinger v. Davis, 146 U. S. 319, 36 L. ed. 989, 13 Sup. Ct. Rep. 105;

United States v. Barnhart, 22 Fed. 290, 10 Sawy. 491; United States v. Heilner, 26 Fed. 80; State v. Bradley, 26 Fed. 290; Ex parte Ulrich, 42 Fed. 589; In re Boggs, 45 Fed. 475; Smith v. Bivens, 56 Fed. 355.

⁴Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

⁵Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

⁷United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750.

forces, including militia, are excepted from presentment and indictment.⁸ Hence a military commission for the trial of persons not in military service has been held unconstitutional.⁹ While the time and place of the commission of the offense must be averred, it may be proven to have been committed on any day prior to the finding of the bill during the period of limitations.¹⁰ Only ultimate matters of fact should be stated.¹¹ Failure of presentment or indictment by grand jury entitles prisoner to habeas corpus.¹²

[c] Double jeopardy.

The defendant is not in jeopardy until the verdict of the jury is rendered for or against him.¹⁴ Hence he is not in jeopardy where the jury is discharged from necessity¹⁵ or where there has been a mistrial.¹⁶ Likewise where a juror is attacked by a sudden illness¹⁷ or is so biased that he is unfit to sit on the case,¹⁸ the defendant is not considered in jeopardy. Where the district attorney enters a nol. pros. after the jury is empaneled and sworn the defendant cannot again be indicted for the same offense, the proceeding being equivalent to an acquittal.¹⁹ The illness of the district attorney is not sufficient grounds for discharging the jury against the will of the defendant.²⁰ The discharge of the jury, allowed to effect the ends of justice, is discretionary with the trial court.¹ Such discharge is allowed in cases of misdemeanors as well as in capital cases.² If after verdict the judgment is arrested or new trial granted at the request of the defendant, he may again be tried.³ The defendant, having been found guilty of a lesser offense than the one charged, cannot again be tried on the

⁸Ex parte Milligan, 4 Wall. 123, 18 L. ed. 296.

⁹Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605; In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596; Ex parte Field, 5 Blatchf. 79, Fed. Cas. No. 4,761.

¹⁰United States v. Francis, 144 Fed. 520.

¹¹Brown v. United States, 143 Fed. 60.

¹²Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935.

¹⁴United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; United States v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321. See also United States v. Jim Lee, 123 Fed. 741.

¹⁵United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15,204; United States v. Wilson, Bald. 78, Fed. Cas. No. 16,730; United States v. Keen, 1 McLean, 434, Fed. Cas. No. 15,510.

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¹⁶United States v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

¹⁷Commonwealth v. Merrill, Thach. C. C. 1.

¹⁸United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; see also Simmons v. United States, 142 U. S. 154, 35 L. ed. 971, 12 Sup. Ct. Rep. 171.

¹⁹United States v. Shoemaker, 2 McLean 114, Fed. Cas. No. 16,279.

²⁰United States v. Watson, 3 Ben. 3, Fed. Cas. No. 16,651.

¹United States v. Perez, 9 Wheat. 580, 6 L. ed. 165; see also Ex parte Lange, 18 Wall. 201, 21 L. ed. 887; Logan v. United States, 144 U. S. 298, 36 L. ed. 441, 12 Sup. Ct. Rep. 617.

²United States v. Haskell, 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

³Coleman v. Tennessee, 97 U. S. 521, 24 L. ed. 1124.

same information for the higher offense.⁴ Likewise where the jury has been discharged, without legal cause and without defendant's consent, the defendant cannot again be tried.⁵

[d] Personal right to life, liberty and property.

Any extended discussion of this important provision of the fifth amendment would be outside of the proper scope of this Code. It is most frequently invoked for the protection of civil and property rights.

§ 1572. Twelve grand jurors must concur in indictment.

No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

R. S. § 1021, U. S. Comp. Stat. 1901, p. 719.

The above section was originally enacted in 1865.⁷ The sections dealing with the Constitution and summoning of grand and petit juries are contained in another chapter.⁸ Apparently the above section does not apply in the organized territories.⁹

§ 1573. Indictment or information for use of mails by counterfeiters, etc.

The indictment, information, or complaint [i. e. when charging unlawful use of the mail in disposing of counterfeit money, etc.] may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or device.

Part of R. S. § 5480, as amended 1889, U. S. Comp. Stat. 1901, p. 3697.

This provision does not prohibit a joint trial, as a matter of economy, of separate indictments charging in the aggregate more than three offenses, covering a period of more than six months.¹¹

§ 1574. Indictment or information in civil rights cases.

All crimes and offenses committed against the provision of chapter seven, title "Crimes," [i. e. offenses against elective franchise and civil rights of citizens] which are not infamous, may be prose-

⁴In re Bennett, 84 Fed. 324.

⁵Ex parte Ulrich, 42 Fed. 587.

⁷Act March 3, 1865, c. 86, § 1, 13 Stat. 500.

⁸Post, § 1700, et seq.

⁹See In re Wilson, 140 U. S. 581,

35 L. ed. 513, 11 Sup. Ct. Rep. 870;

Reynolds v. United States, 98 U. S.

154, 25 L. ed. 244.

¹¹Brown v. United States, 143 Fed. 66.

cuted either by indictment or by information filed by a district attorney.

R. S. § 1022, U. S. Comp. Stat. 1901, p. 720.

The above section was originally enacted in 1870.¹³ The section does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the United States laws.¹⁴

§ 1575. Form of indictment for perjury.

In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

R. S. § 5396, U. S. Comp. Stat. 1901, p. 3655.

The above section was carried into the Revised Statutes from an act of 1790.¹⁵ The provision permitting formal defects in an indictment to be disregarded¹⁷ does not dispense with the requirements of this section.¹⁸ The indictment need not set forth in *hæc verba* the affidavit made by the defendant on which the perjury charge is based.¹⁹ Neither is it necessary to state the name of the judge before whom the perjury was alleged to have been committed.²⁰

§ 1576. — for subornation of perjury.

In every presentment or indictment for subornation of perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or

¹³Act May 31, 1870, c. 114, § 8, 16 Stat. 142.

¹⁴Ex parte Wilson, 114 U. S. 421, 29 L. ed. 89, 5 Sup. Ct. Rep. 935.

¹⁵Act April 30, 1790, c. 9, § 19, 1 Stat. 116.

¹⁷Post, § 1579.

¹⁸Markham v. United States, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. Rep. 288.

¹⁹United States v. Law, 50 Fed.

916.

²⁰United States v. Walsh, 22 Fed.

644.

certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.

R. S. § 5397, U. S. Comp. Stat. 1901, p. 3655.

The above is taken from an act of 1790.¹

§ 1577. — for perjury before naval court-martial.

In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court.

R. S. § 1023, U. S. Comp. Stat. 1901, p. 720.

§ 1578. Several charges in one indictment.

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

R. S. § 1024, U. S. Comp. Stat. 1901, p. 720.

The above section was originally enacted in 1853.³ There is a similar provision relating to the offenses of bigamy and polygamy in the Territories.⁴ All offenses which might formerly have been joined under the rules of pleading may be so joined under this section.⁵ However the section does not limit the joinder or consolidation to charges which may have been joined at common law. It merely vests the court with a discretion.⁶ Where two or more indictments are found against a person for the same act or for two or more acts connected together the court may order them to be consolidated.¹⁷ They may be ordered consolidated though two persons are jointly charged in each.¹⁸ As where two indictments are

¹Act April 30, 1790, c. 9, § 20, 1 Stat. 116.

³Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

⁴See R. S. § 5352; act March 22, 1882, c. 47, § 4, 22 Stat. 31, U. S. Comp. Stat. 1901, pp. 3633, 3634.

⁵United States v. Kazinski, 2 Spr. 7, Fed. Cas. No. 15,508.

⁶Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274.

¹⁷Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

¹⁸Turner v. United States, 66 Fed. 280, 13 C. C. A. 436.

brought against the same defendants, under R. S. § 5427, charging them with aiding and abetting a different person in the use of false certificates of naturalization.¹⁹ Indictments against the same person for conspiracy to defraud the United States by means of illegal entries of public lands by different persons have been held to be "for the same class of offenses," and consolidated.²⁰ Where several offenses are charged and a general verdict is had judgment can be entered only for a single offense.¹ If the prisoner is found guilty on several counts, he may be sentenced under one count and the sentences on the others will be suspended until the first sentence has been executed.² The above section does not take away the right which the court has to compel the prosecutor to elect upon what count he will ask conviction.³ It is not, however, a duty of the court to demand an election, which will be ordered only in the court's discretion.⁴ Improper consolidations of trials is a reversible error.⁵ Several indictments against the same defendant may be tried together in the court's discretion to avoid unnecessary delay and expense, without there being a consolidation under this section.⁶

§ 1579. Defects in form disregarded.

No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

R. S. § 1025, U. S Comp. Stat. 1901, p. 720.

The above section was first enacted in 1872.⁸ It does not dispense with the requirement of the Revised Statutes that an indictment for perjury must set forth the substance of the offense charged.⁹ No mere irregularity or defect in form of the proceeding which does not tend to the prejudice of the defendant is ground for a new trial.¹⁰ The fact that a different rule obtains in the State court does not affect the above section.¹¹ Repugnancy in an indictment is a formal defect and is cured by a general verdict of

¹⁹Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274.

²⁰Olson v. United States, 133 Fed. 849, 57 C. C. A. 21.

¹United States v. Maguire, 3 Cent. L. J. 273, Fed. Cas. No. 15,708.

²United States v. Blaisdell, 3 Ben. 132, Fed. Cas. No. 14,608.

³McElroy v. United States, 164 U. S. 77, 41 L. ed. 355, 17 Sup. Ct. Rep. 31; Ingraham v. United States,

155 U. S. 437, 39 L. ed. 213, 15 Sup. Ct. Rep. 148; Pointer v. United States, 151 U. S. 403, 38 L. ed. 208, 14 Sup. Ct. Rep. 410.

⁴Chadwick v. United States, 141 Fed. 237.

⁵McElroy v. United States, 164 U. S. 80, 41 L. ed. 355; 17 Sup. Ct. Rep. 31.

⁶See Brown v. United States, 143 Fed. 66.

⁸Act June 1, 1872, c. 255, § 8, 17 Stat. 198.

⁹Ante § 1575; Markham v. United States, 160 U. S. 319, 40 L. ed. 441, 16 Sup. Ct. Rep. 288.

¹⁰United States v. Molloy, 31 Fed. 19.

¹¹Idem.

guilty.¹² It is unnecessary that a plea to an indictment for irregularities aver that the defects were prejudicial to the defendant, but facts showing such prejudice should be averred and proved.¹³ The existence of a technical defect in an information or indictment does not make it no information or indictment at all.¹⁴ Error in the caption of an indictment as to the time in which found is amendable by the record.¹⁵

§ 1580. Proceedings after demurrer overruled.

In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

R. S. § 1026, U. S. Comp. Stat. 1901, p. 720.

The above section was carried forward into the Revised Statutes from an act of 1872.¹⁷ A plea of not guilty being withdrawn to permit a demurrer, the overruling of the demurrer does not necessitate the record showing a second plea of not guilty.¹⁸

§ 1581. One warrant sufficient on several indictments or charges against same person.

When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms.

R. S. § 1027, U. S. Comp. Stat. 1901, p. 721.

The above section was originally enacted in 1853.²⁰

§ 1582. Copy of writ, warrant or mittimus for jailer—original to be returned.

Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the

¹²Lehman v. United States, 127 Fed. 41, 61 C. C. A. 577.

¹³United States v. Cobban, 127 Fed. 713.

¹⁴In re Rowe, 77 Fed. 161.

¹⁵United States v. Clark, 125 Fed. 92.

¹⁷Act May 23, 1872, c. 202, 17 Stat. 158.

¹⁸O'Hara v. United States, 129 Fed. 551, 64 C. C. A. 81.

²⁰Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon.

R. S. § 1028, U. S. Comp. Stat. 1901, p. 721.

The above was originally enacted in 1853.¹ The provision respecting arrest and commitment requires the return of copies of all process there provided for, to the clerk's office.² The above section does not render a prisoner's detention unlawful because of a defect in a copy of the writ, warrant or mittimus.³

§ 1583. Writ for removal of prisoner from one district to another.

Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.

R. S. § 1029, U. S. Comp. Stat. 1901, p. 721.

The above section was originally enacted in 1853.⁵ Provisions respecting removal are contained in a previous section of this Code.⁶

§ 1584. Writ unnecessary to bring person in custody into court.

No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.

R. S. § 1030, U. S. Comp. Stat. 1901, p. 721.

The above section was first enacted in 1853.⁸ It is held to apply only to the case of prisoners confined at the place where the court is in session, and not to those in custody at a place remote therefrom.⁹ It has no reference to a person held in custody by a State officer pending or following examination.¹⁰ The person in custody must already have been committed to the sheriff or jailer by virtue of a writ or warrant as provided by R. S. § 1028,¹¹ before the section applies.¹² Hence the clause

¹Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 163.

²Ante, § 1537.

³Howard v. United States, 75 Fed. 986, 21 C. C. A. 586, 34 L.R.A. 509.

⁵Act Feb. 26, 1863, c. 80, § 1, 10 Stat. 162.

⁶See ante, § 1537, and notes.[C]-[K]

⁸Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 169.

⁹Van Duzee v. United States, 48 Fed. 648; Taylor v. United States, 45

Fed. 531; United States v. Donahower, 85 Fed. 547, 29 C. C. A. 342; Puleston v. United States, 85 Fed. 571; see also United States v. Marsh, 106 Fed. 474.

¹⁰United States v. Ewing, 140 U. S. 146, 35 L. ed. 390, 11 Sup. Ct. Rep. 743.

¹¹Ante, § 1582.

¹²Erwin v. United States, 37 Fed. 486, 2 L.R.A. 229.

as to remanding applies only where the prisoner is in custody under a warrant from the court, and not where he is arrested under a commissioner's warrant.¹³ The power given under the section is restricted to the court and district attorney and all other officers are excluded.¹⁴ It seems that the jailer may insist on written evidence of the order of the court or district attorney before allowing a prisoner to be taken from his custody.¹⁵

§ 1585. Standing mute equivalent to plea of not guilty.

When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

R. S. § 1032, U. S. Comp. Stat. 1901, p. 722.

The above section includes persons arraigned on information also.¹⁷ It applies to an offense created by a statute enacted since its adoption.¹⁸

§ 1586. Accused in capital cases to have copy of indictment and list of witnesses.

When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

R. S. § 1033, U. S. Comp. Stat. 1901, p. 722.

The above section was first enacted in 1790.²⁰ The section applies to capital cases only,¹ in the circuit and district courts of the United States

¹³Marvin v. United States, 44 Fed. 405. States v. Barger, 7 Fed. 193, 19 Blatchf. 249.

¹⁴United States v. Harden, 10 Fed. 802, 4 Hughes, 455.

¹⁵United States v. Martin, 17 Fed. 150, 9 Sawy. 90.

¹⁷In re Smith, 13 Fed. 25; United

¹⁸United States v. Hare, 2 Wheel. C. C. 283, Fed. Cas. No. 15,304.

²⁰Act April 30, 1790, c. 9, § 29, 1 Stat. 118.

¹Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570.

and does not control the practice and proceedings of a Territory.² The provision as to three days is limited strictly to cases of treason.³ Copies of both caption and indictment should be delivered to the prisoner in such cases⁴ and he is entitled to a reasonable time after copy is delivered, to investigate the character and conduct of the witnesses.⁵ In capital cases other than treason it has been held that the prisoner is entitled to a copy of the indictment and list of witnesses, two days before the day of arraignment and exclusive of the day of delivery of the copy.⁶ Other cases, however, have held that the copy must be delivered two days before jury trial and not two days before arraignment.⁷ If the right to a copy and list is not insisted upon before the pleadings and trial no objection can afterwards be taken to the proceedings.⁸ If the prisoner acknowledges a receipt of the copy before arraignment, it is a waiver of his right if he has not received it.⁹ Where no objection has been made till after the jury has been sworn the omission to serve a copy on the prisoner is no ground for arrest of judgment or new trial.¹⁰ After the trial has commenced it is too late to present a list of the witnesses to the prisoner even though the court should adjourn for three days so that the prisoner may not be surprised.¹¹ In general the provisions of the section are mandatory upon the government but its benefits may be waived by failure to make seasonable objection.¹² The section does not include witnesses necessary in rebuttal, but only those necessary for proving the indictment.¹³ Where there has been no preliminary examination the court may in its discretion order a list of the witnesses sworn before the grand jury, to be delivered to the prisoner.¹⁴

§ 1587. — also to have counsel and witnesses summoned for him.

Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed, in his defense,

²Thiede v. Utah Territory, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

³United States v. Wood, 3 Wash. C. C. 440, Fed. Cas. No. 16,756.

⁴United States v. Insurgents, 2 Dall. 335, 1 L. ed. 405.

⁵United States v. Stewart, 2 Dall. 343, 1 L. ed. 408.

⁶United States v. Dow, Taney 34, Fed. Cas. No. 14,990.

⁷United States v. Neversen, 1 Mack. 152; United States v. Curtis, 4 Mason, 232, Fed. Cas. No. 14,905.

⁸United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14,868.

⁹United States v. Cornwell, 2 Mason, 91, Fed. Cas. No. 14,868.

¹⁰United States v. Curtis, 4 Mason, 232, Fed. Cas. No. 14,905.

¹¹United States v. Neversen, 1 Mack. 152.

¹²Horton v. United States, 15 App. D. C. 320.

¹³Goldsbey v. United States, 160 U. S. 76, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

¹⁴United States v. Southmayd, 6 Biss. 321, Fed. Cas. No. 16,361.

to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

R. S. § 1034, U. S. Comp. Stat. 1901, p. 722.

The above section was first enacted in 1790.¹⁶ Part of it is given in an earlier chapter of this Code.¹⁷

§ 1588. Verdict may be for lesser offense than charged.

In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense.

R. S. § 1035, U. S. Comp. Stat. 1901, p. 723.

The above section was carried forward into the Revised Statutes from an act of 1872.¹⁸ After a verdict of guilty has been set aside as not supported by evidence the court has power at the same term to accept a plea of guilty of lesser included offense and render judgment thereon.²⁰ A sentence may be amended for clerical error after term by a *nunc pro tunc* order.¹

§ 1589. — may be against some of several joint defendants.

On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

R. S. § 1036, U. S. Comp. Stat. 1901, p. 723.

The above section was carried forward into the Revised Statutes from an act of 1782.³ The section is not, in terms, applicable to separate indictments tried together.⁴ On an indictment charging conspiracy the acquittal of one is an acquittal of both;⁵ but if it charges a conspiracy of the defendants with others unknown, a verdict may be rendered against one and in favor of the other.⁶

¹⁶Act April 30, 1790, c. 9, § 29, 1 Stat. 118.

¹⁷Ante, § 494.

¹⁸Act June 1, 1872, c. 255, § 9, 17 Stat. 198.

²⁰United States v. Linnier, 135 Fed. 83.

¹In re Welty, 123 Fed. 122.

³Act June 1, 1872, c. 255, § 10, 17 Stat. 198.

⁴Bucklin v. United States, 159 U. S. 686, 40 L. ed. 305, 16 Sup. Ct. Rep. 182.

⁵United States v. Hamilton, 8 Chic. N. L. 211, Fed. Cas. No. 15,288.

⁶Idem.

§ 1590. When indictment transferred from district to circuit court and vice versa.

Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court.

R. S. § 1037, U. S. Comp. Stat. 1901, p. 723.

The above section was first enacted in 1846.⁸ Remissions as provided for in this section are allowed only in criminal cases in which the district and circuit courts have concurrent jurisdiction.⁹ It has been held in general that a case may be remitted from one court to another at any time from the presentment of the indictment till final judgment.¹⁰ Hence an indictment may be remitted after the defendant has pleaded.¹¹ After conviction, however, a remission is not lawful.¹² In remitting a case, a certified copy of the indictment is sufficient.¹³ A circuit court may amend its record after cause is remitted to the district court.¹⁴ A case remitted to district court may be again remitted to the original court under proper circumstances.¹⁵ The court cannot of its own motion, or on application of the defendant, remit an indictment to another court.¹⁶

§ 1591. — in cases involving difficult questions of law.

Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district

⁸Act Aug. 8, 1846, c. 98, § 2, 9 Stat. 72.

⁹Campbell v. Kirkpatrick, 5 McLean, 175, Fed. Cas. No. 2,363.

¹⁰United States v. Haynes, 29 Fed. 691.

¹¹United States v. Richardson, 28 Fed. 61.

¹²United States v. Haynes, 26 Fed. 857; see also *In re Haynes*, 30 Fed. 767.

¹³United States v. McKee, 4 Dill. 1, Fed. Cas. No. 15,687.

¹⁴Kelly v. United States, 27 Fed. 617.

¹⁵United States v. Murphy, 3 Wall. 649, 18 L. ed. 217; see also *United States v. Richardson*, 28 Fed. 65.

¹⁶United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14,571.

court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein.

R. S. § 1038, U. S. Comp. Stat. 1901, p. 723.

The above section was carried forward into the Revised Statutes from an act of 1846.¹⁸ A case may be remitted after the term when it was presented,¹⁹ and also after the defendant has pleaded.²⁰ The word "session" as used above means an actual sitting of the court for the transaction of business and not in the sense of term. Hence a circuit court has jurisdiction to proceed with a case so remitted at the then current term.¹

§ 1592. — all capital cases remitted to circuit court.

Every indictment of a capital offense presented to a district court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; and, on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon, in the same manner as if said indictment had been originally found and presented therein.

R. S. § 1039, U. S. Comp. Stat. 1901, p. 723.

The above is from an act of 1846.³ An act of 1883,⁴ annexing part of Indian Territory to the Kansas judicial district repealed this section, pro tanto, by vesting in the district courts at Wichita and Fort Scott in the district of Kansas, "exclusive original jurisdiction."⁵ However that provision was afterwards superseded.⁶

§ 1593. Power to hold to security for peace and good behavior.

The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts, and the judges and other magistrates of the several States who are or may be authorized by law to make arrest for offenses against the United States, shall have the like authority to hold to security of the peace, and for good behavior, in cases arising under the Constitution and laws

¹⁸Act Aug. 8, 1846, c. 98, § 3, 9 Stat. 723.

¹⁹United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815.

²⁰United States v. Richardson, 28 Fed. 61.

¹United States v. Deitrich, 126 Fed. 659.

³Act Aug. 8, 1846, c. 98, § 3, 9 Stat. 72.

⁴Act Jan. 6, 1883, c. 13, § 2, 22 Stat. 400.

⁵Mattox v. United States, 156 U. S. 239, 39 L. ed. 409, 15 Sup. Ct. Rep. 448.

⁶Ibid; act May 2, 1890, § 9, 26 Stat. 81; act March 1, 1889, c. 333, 25 Stat. 783.

of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.

R. S. § 727, U. S. Comp. Stat. 1901, p. 584.

This section was made applicable to the courts in District of Columbia by act of 1874.⁸ The offices of the commissioners of the circuit courts mentioned in the above section were abolished by act of 1896, and United States commissioners were appointed in their places.⁹

§ 1594. Punishment of offenses committed in places not ceded to United States.

If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.

R. S. § 5391, U. S. Comp. Stat. 1901, p. 3651.

A provision in an act of 1898 contained in the next section of this Code virtually supersedes the above section. It had previously been decided that the words "now in force" in this section permitted prosecution only where a State law was in force at the time the provision was originally enacted, i. e. in 1825.¹¹

§ 1595. — later provision of act of 1898.

When any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a State, or which has been purchased with the consent of a State for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the

⁸Act June 22, 1874, c. 396, § 2, ¹¹United States v. Barnaby, 51
18 Stat. 193. Fed. 20.

⁹See ante, § 672.

laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such State law shall affect any such prosecution.

§ 2 of act July 7, 1898, c. 576, 30 Stat. 717, U. S. Comp. Stat. 1901, p. 3652.

The nature and extent of the Federal jurisdiction over places ceded to the United States are considered in early sections of this Code.¹³

§ 1596. Continuances grantable in internal revenue prosecutions.

It shall be lawful for any court in which any suit or criminal proceeding arising under the internal revenue laws may be pending, to continue the same at any stage thereof, for good cause shown on motion by the district attorney.

R. S. § 3231, U. S. Comp. Stat. 1901, p. 2090.

The above section was originally enacted in 1863.¹⁵ Discontinuance or nol. pros. in prosecutions for illicit distilling is forbidden by R. S. § 3230.¹⁶

¹³Ante, §§ 25, 36.

¹⁵Act July 20, 1868, c. 186, § 102,
15 Stat. 166.

¹⁶Ante, § 1390.

CHAPTER 49.

PUNISHMENT, CUSTODY AND DISCHARGE OF PRISONERS.

- § 1606. Judgments for fines enforced by execution against defendant's property.
- § 1607. Release of poor convict for inability to pay fine.
- § 1608. Excessive fines and cruel punishment prohibited.
- § 1609. Expenses of transportation, detention and execution of Federal prisoners.
- § 1610. —transportation of prisoners to Federal prisons—expenses.
- § 1611. Marshal may provide jail where use of State jail not allowed.
- § 1612. —and otherwise provide safe-keeping of prisoners.
- § 1613. Federal convicts in State prisons to be under State official's control.
- § 1614. Right to commit to State prison outside judicial district.
- § 1615. Sentences for more than one year to State jail if it permit.
- § 1616. Court may order penitentiary sentences executed in any prison of State if it permit.
- § 1617. Deduction from term of imprisonment for good conduct.
- § 1618. —restoration of forfeited commutation.
- § 1619. Actual reasonable cost of keeping prisoners to be paid.
- § 1620. Designation of penitentiary by Attorney General—transportation.
- § 1621. Attorney General to contract for subsistence, etc.
- § 1622. When prisoners committed to house of correction or reformatory.
- § 1623. Confinement of juvenile offenders—expenses of transportation, etc.
- § 1624. —Attorney General to designate houses of refuge and contract for subsistence.
- § 1625. Prisoners to be provided with money and clothes on discharge.
- § 1626. —similar provisions as to discharge from Federal prisons.
- § 1627. Removal of prisoners in case of contagion or epidemic.
- § 1628. Provisions respecting Federal prisons.
- § 1629. Attorney General to supervise Federal prisons.
- § 1630. —to designate to which prisons convicts to be committed.
- § 1631. —may transfer prisoners elsewhere to Federal penitentiary.
- § 1632. Employment of prisoners in Federal prisons.

- § 1606. Judgments for fines enforced by execution against defendant's property.

In all criminal or penal causes in which judgment or sentence

has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

R. S. § 1041, U. S. Comp. Stat. 1901, p. 724.

The above section was first enacted in 1872.¹ If nothing is said in the judgment as to the mode of enforcing it, a *fi. fa.* or a *capias pro fine* may be issued.² The above section gives to the government no greater rights than are given to private judgment creditors, hence a State law forbidding the levy of execution on real estate of the defendant is enforceable against the United States.³ So also where the State law exempts the defendant's homestead the United States cannot levy execution thereon.⁴

§ 1607. Release of poor convict for inability to pay fine.

When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [State where

¹Act June 2, 1872, c. 225, § 12, 17 Stat. 198.

³Clark v. Allen, 117 Fed. 699.

⁴Fink v. O'Neil, 106 U. S. 272, 27

²Ex parte Teuscher, 23 Int. Rev. L. ed. 196, 1 Sup. Ct. Rep. 325. Rec. 202, Fed. Cas. No. 13,846.

oath is administered] ; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts.

R. S. § 1042, U. S. Comp. Stat. 1901, p. 724.

The above section was first enacted in 1872.⁶ It is almost identical in phraseology and apparently identical in substance with R. S. § 5296, which is therefore omitted from this Code.⁷ The commissioner's fees for the examination and certificate in cases of applications under the above section are five dollars a day for the time necessarily employed.⁸ Where a convict is pardoned on the condition that he pay fine and costs, he is not entitled to his discharge under this section until he has served his term, and thirty days additional as provided in this section.⁹ This section seems to imply that a fine imposed may be enforced by imprisonment until it is paid.¹⁰ There is nothing however to indicate that such imprisonment may be extended beyond the maximum term of imprisonment fixed by Congress in punishment of the particular offense, and no authority for imprisonment in a State prison in default of the payment of the fine imposed.¹¹

§ 1608. Excessive fines and cruel punishment prohibited.

Excessive bail shall not be required,¹³ nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Eighth Amendment, U. S. Constitution.

This amendment applies to Federal, and not State, action.¹⁴ Punishment is defined as cruel when involving torture or a lingering death or where inhuman or barbarous.¹⁵ Punishment by death is not cruel or unusual in the legal sense;¹⁶ nor is death by shooting;¹⁷ or electricity;¹⁸ nor is the infliction of increased punishment for a second offense.¹⁹ A sentence for the full term authorized by statute cannot be declared cruel and unusual within this amendment.²⁰ The keeper of a State jail, being

⁶Act June 1, 1872, c. 255, § 14, 17 Stat. 198.

⁷See U. S. Comp. Stat. 1901, p. 3,608.

⁸Ante, § 723.

⁹In re Ruhl, 5 Savy. 186, Fed. Cas. No. 12,124.

¹⁰In re Greenwald, 77 Fed. 590.

¹¹Idem.

¹²See ante, § 1543.

¹⁴Pervear v. Commonwealth, 5 Wall. 480, 18 L. ed. 608.

¹⁵In re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

Fed. Proc.—84.

¹⁶In re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

¹⁷Wilkerson v. Utah, 99 U. S. 135, 25 L. ed. 345.

¹⁸In re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

¹⁹Moore v. Missouri, 159 U. S. 677, 40 L. ed. 301, 16 Sup. Ct. Rep. 179;

McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389.

²⁰Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

a Federal officer for the purpose of properly caring for Federal prisoners, may be punished by the Federal court.¹

§ 1609. Expenses of transportation, detention and execution of Federal prisoners.

All the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the treasury of the United States in the manner provided by law.

R. S. § 5536, U. S. Comp. Stat. 1901, p. 3719.

§ 1610. — transportation of prisoners to Federal prisons—expenses.

The transportation of all United States prisoners convicted of crimes against the laws of the United States in any State, District or Territory, and sentenced to terms of imprisonment in a penitentiary, and their delivery to the superintendent, warden, or keeper of such United States prisons, shall be by the marshal of the district or Territory where such conviction may occur, after the erection and completion of said prisons. . . . ³ The actual expenses of such marshal, including transportation and subsistence, hire, transportation and subsistence of guards, and the transportation and subsistence of the convict or convicts, be paid, on the approval of the Attorney General out of the judiciary fund.

§ 5 of act March 3, 1891, c. 529, 26 Stat. 839, U. S. Comp. Stat. 1901, p. 3726.

§ 1611. Marshal may provide jail where use of State jail not allowed.

In a State where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under the direction of the judge of the district, may hire, or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail.

R. S. § 5537, U. S. Comp. Stat. 1901, p. 3719.

¹In re Birdsong, 39 Fed. 599, 4 L. L.R. 628.

³"That" is omitted.

The above section was carried forward into the Revised Statutes from an act of 1833.⁵ In cases under this section no special process of commitment is necessary.⁶ A Federal prisoner cannot object to imprisonment in a State prison on the ground that there was no authorization of such a course by the State legislature. Such objection can only be made by the State.⁷

§ 1612. — and otherwise provide safe-keeping of prisoners.

The marshal shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law.

R. S. § 5538, U. S. Comp. Stat. 1901, p. 3719.

The above section was enacted in 1833.⁹ The right of Federal prisoners to be protected is a constitutional one,¹⁰ and the marshal owes a duty to keep them safe and protect them from injury.¹¹

§ 1613. Federal convicts in State prisons to be under State official's control.

Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.

R. S. § 5539, U. S. Comp. Stat. 1901, p. 3720.

The above section was originally enacted in 1834.¹² An act of 1887 makes it unlawful for any government officer, agent or servant to permit any State officer to hire out United States convicts incarcerated in a State prison.¹³

State jails where Federal prisoners are confined are not under the control of the marshal nor is the jailer's custody that of the marshal.¹⁴

⁵Act March 2, 1833, c. 57, § 6, 4 Stat. 634.

⁶Erwin v. United States, 37 Fed. 470, 2 L.R.A. 229.

⁷Ex parte Geary, 2 Biss. 485, 10 Fed. Cas. No. 5,293.

⁹Act March 2, 1833, c. 57, § 6, 4 Stat. 634.

¹⁰Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

¹¹Asher v. Cabell, 50 Fed. 818, 1 C. C. A. 693.

¹²Act June 30, 1834, c. 163, 4 Stat. 739.

¹³Act Feb. 27, 1887, c. 213, § 1, 24 Stat. 411.

¹⁴Randolph v. Donaldson, 9 Cranch, 76, 3 L. ed. 662; Erwin v. United States, 37 Fed. 470, 2 L.R.A. 229.

The State jailer is not an officer of the United States except in a special sense and for a special purpose,^{14½} and commissioners have no power to call upon him to perform any service.¹⁵ Where hard labor is part of the discipline imposed in a State prison to which a Federal court is empowered to commit Federal prisoners, the inclusion of "hard labor" in the sentence will not render it void though the statute only declare the offense punishable by imprisonment without any mention of hard labor.¹⁶ If, however, a sentence improperly include "hard labor" only such illegal excess is void and the sentence may be amended.¹⁷

§ 1614. Right to commit to State prison outside judicial district.

Where a judicial district has been or may hereafter be divided, the circuit and district courts of the United States shall have power to sentence any one convicted of an offense punishable by imprisonment at hard labor to the penitentiary within the State, though it be out of the judicial district in which the conviction is had.

R. S. § 5540, U. S. Comp. Stat. 1901, p. 3720.

The above section was carried forward into the Revised Statutes from an act of 1856.¹⁹

§ 1615. Sentences for more than one year to State jail if it permit.

In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

R. S. § 5541, U. S. Comp. Stat. 1901, p. 3721.

The above section was carried forward into the Revised Statutes from an act of 1865.¹ If sentence of imprisonment is imposed for a term not exceeding one year it is within the discretion of the court to order confinement in State prison.² The Attorney General may have a prisoner re-

^{14½}See *In re Birdsong*, 39 Fed. 599, 4 L.R.A. 628.

¹⁵*Saunders v. United States*, 73 Fed. 782.

¹⁶*United States v. Pridgeon*, 153 U. S. 48, 61, 38 L. ed. 636, 14 Sup. Ct. Rep. 746; see also *Ex parte Geary*, 2 Biss. 485, 10 Fed. Cas. No. 5,293.

¹⁷*Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452; *Haynes v.*

United States, 101 Fed. 817, 42 C. C. A. 34.

¹⁹Act March 28, 1856, c. 9 § 1, 11 Stat. 2.

¹Act March 3, 1865, c. 86, § 3, 13 Stat. 500.

²*Ex parte Karstendick*, 93 U. S. 396, 23 L. ed. 889; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 636, 14 Sup. Ct. Rep. 746.

moved to another prison under certain circumstances.³ Where the sentence is imprisonment for one year or less, the court cannot under the above section confine the prisoner in a State jail.⁴ But it has been held that an order of imprisonment for one year in a State jail is not void, but merely irregular.⁵ After commitment to State jail under the section the court has no power, after the expiration of the term of court in which the sentence was imposed, to remove the prisoner to a county jail, as such a proceeding would tend to lessen the ignominy of the punishment.⁶ Although for some purposes the different counts of an indictment may be regarded as so far separate as to be different indictments, yet a sentence on two counts for a term of two years may be executed in a State prison and is not void as being "for one year only" on each offense.⁷ Where the law provides for imprisonment alone and the person is sentenced for more than a year, the court may in its discretion order imprisonment in an institution where hard labor is part of the discipline.⁸

§ 1616. Court may order penitentiary sentences executed in any prison of State if it permit.

In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

R. S. § 5542, U. S. Comp. Stat. 1901, p. 3721.

The above section was originally enacted in 1825.¹⁰ R. S. § 5546, is to be construed in connection with this section.¹¹ The section relates to imprisonment at hard labor without reference to the length of the imprisonment.¹² The terms of the section are explicit and amount to a denial of the power of the court to order imprisonment in any place where hard labor is not required.¹³ Hence imprisonment in a place not authorized by the section entitles a prisoner to habeas corpus but without prejudice

³Post, § 1631.

⁴In re Bonner, 151 U. S. 255, 38 L. ed. 151, 14 Sup. Ct. Rep. 323; In re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762; United States v. Cobb, 43 Fed. 570; Haynes v. United States, 101 Fed. 817, 42 C. C. A. 34; In re De Puy, 3 Ben. 307, 7 Fed. Cas. No. 3,814.

⁵Ex parte Friday, 43 Fed. 916.

⁶United States v. Greenwald, 64 Fed. 8.

⁷Dimmick v. Tompkins, 194 U. S. L. ed. 149, 14 Sup. Ct. Rep. 323.

541, 48 L. ed. 1111, 24 Sup. Ct. Rep. 780.

⁸In re Welty, 123 Fed. 123; see also Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889; In re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762.

¹⁰Act March 3, 1825, c. 65, § 15, 4 Stat. 118.

¹¹See post, § 1620.

¹²Ex parte Friday, 43 Fed. 920.

¹³In re Bonner, 151 U. S. 255, 38

to his being sentenced in accordance with the law upon the verdict.¹⁴ After expiration of the term in which the sentence was imposed, the court has no power to order the removal of the prisoner, from a State prison to a county jail.¹⁵ The court may, however, order a prisoner's removal to another penitentiary in the same State of equal degree and grade and where the prison discipline would be the same as that of the first penitentiary.¹⁶ Offenses punishable "for more than one year" as provided by the previous section,¹⁷ or "at hard labor" as provided above, are "infamous,"¹⁸ and cannot be prosecuted by information.¹⁹

§ 1617. Deduction from term of imprisonment for good conduct.

Each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and not less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated. . . . This act shall apply to all sentences imposed subsequent to July 21, 1902, and to the sentences imposed prior thereto, the commutation upon which is less than that provided in this act.

§§ 1 and 3 of act June 21, 1902, c. 1140, 32 Stat. 397, U. S. Comp. Stat. 1903, p. 448, as amended act April 27, 1906, c. 1997, 34 Stat. 1497.

¹⁴Idem.

¹⁵United States v. Greenwald, 64 Fed. 6.

¹⁶United States v. Greenwald, 64 Fed. 6.

¹⁷Ante, § 1615.

¹⁸United States v. DeWalt, 128 U.

S. 393, 32 L. ed. 486, 9 Sup. Ct. Rep. 111; Ansbro v. United States, 159 U.

S. 697, 40 L. ed. 310, 16 Sup. Ct. Rep.

187; Ex parte McClusky, 40 Fed. 71.

¹⁹United States v. Cobb, 43 Fed.

570; see R. S. §.

Section three of the act of 1902, originally provided that it should apply only to sentences imposed by courts subsequent to the time when it took effect;¹ and that the prior law should continue to govern commutations on sentences previously imposed. That prior law was comprised in R. S. §§ 5543, 5544 and in acts of 1875 and of 1891.² The amendment of 1906 consisted in making the new rules of commutation applicable to earlier sentences, where the old commutation was less. Authorities construing the old law are collected in a footnote.³ It would seem that the new law does not apply to prisoners in county jails, any more than did the old.⁴

§ 1618. — restoration of forfeited commutation.

In the case of convicts in any United States penitentiary, the Attorney General shall have the power to restore to any such convict who has heretofore or may hereafter forfeit any good time by violating any existing law or prison regulation such portion of lost good time as may be proper, in his judgment, upon recommendations and evidence submitted to him by the warden in charge. Restoration, in the case of United States convicts confined in State and Territorial institutions, shall be regulated in accordance with the rules governing such institutions, respectively.

§ 2 of act June 21, 1902, c. 1140, 32 Stat. 397, U. S. Comp. Stat. 1905, p. 731.

§ 1619. Actual reasonable cost of keeping prisoners to be paid.

Hereafter there shall be allowed and paid by the Attorney General, for the subsistence of prisoners in the custody of any marshal of the United States and the warden of the jail in the District of Columbia, such sum only as it reasonably and actually cost to subsist them. And it shall be the duty of the Attorney General to prescribe such regulations for the government of the marshals and the warden of the jail in the District of Columbia, in relation to their duties under this chapter [i. e., chapter nine of title seventy of the Revised Statutes, dealing with "Prisoners and Their Treat-

¹I. e., July 21, 1902, thirty days after its approval. Howard v. United States, 75 Fed. 986, 21 C. C. A. 586, 34 L.R.A. 509;

²Act March 3, 1875, c. 145, § 1; In re Willis, 83 Fed. 148.

act March 3, 1891, c. 529, § 8; see ⁴United States v. Schroeder, 14 Blatchf. 344, Fed. Cas. No. 16,233; In re Terry, 37 Fed. 649, 13 Sawy.

³In re Terry, 37 Fed. 652, 13 Sawy. 598; United States v. Goujon, 39 Fed. 773; In re Deering, 60 Fed. 267.

ment"] as will enable him to determine the actual and reasonable expenses incurred.

R. S. § 5545, U. S. Comp. Stat. 1901, p. 3722.

The above section was carried into the Revised Statutes from an act of 1872.⁶ An act of 1891⁷ provides for the payment of transportation and subsistence of prisoners in Federal prisons.

§ 1620. Designation of penitentiary by Attorney General—transportation.

All persons who have been, or may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a district or territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and the delivery shall be by the warden of the jail of that district; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the Attorney General, out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any State, Territory or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case, when, in the opinion of the Attorney General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: Provided, however, that

⁶Act March 5, 1872, c. 30, § 1, 17 Stat. 35.

⁷Act March 3, 1891, c. 529, § 5, 26 Stat. 839.

no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.

R. S. § 5546, as amended 1876, 1901, U. S. Comp. Stat. 1901, p. 3723.

The above section was first amended in 1876⁹ and finally amended by act of 1901, to read as set forth above.¹⁰ An act of 1891 providing for the building of Federal prisons authorizes the Attorney General to designate to which of such prisons, persons convicted in any particular State or Territory should be carried.¹¹ The section is to be construed in connection with R. S. §§ 5541, 5542¹² and may be treated as provisos to them.¹³ Hence one sentenced for a term not exceeding one year, without hard labor, cannot be confined in a State penitentiary in another district, under the above section.¹⁴ Notwithstanding the use of the words "district or Territory" in the first clause, the section apparently applies to cases where there is no suitable penitentiary within the State.¹⁵ The power of removal is in the hands of the Attorney General and not in the courts.¹⁶ Although he may move a prisoner from one jail or prison to another, he has no power to order a prisoner sentenced to jail to be confined in a penitentiary.¹⁷ Nor can the court authorize imprisonment in a penitentiary where the statute intends imprisonment alone to be the punishment.¹⁸ The order of the Attorney General that the prisoner be confined in a State penitentiary is not invalid because the State has not given its consent that the penitentiary shall be so used;¹⁹ and the prisoner himself cannot object where the State does not.²⁰ The prevalent practice is for the Attorney General to notify the different courts, through the district attorney, of the designation that he has made for the different districts from time to time and to procure to be entered upon the minutes of the court in each district an order showing the designation which is in force.¹ But it is not necessary to state in the judgment, on committing the prisoner, that the place of imprisonment was so authorized by the Attorney General.² The

⁹Act July 12, 1876, c. 183, 19 Stat. 88.

¹⁰Act March 3, 1901, c. 873, 31 Stat. 1450.

¹¹See post § 1630.

¹²See ante, §§ 1615, 1616.

¹³Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889; United States v. McMahon, 164 U. S. 81, 41 L. ed. 357, 17 Sup. Ct. Rep. 28; see also Ex parte McClusky, 40 Fed. 71.

¹⁴United States v. Cobb, 43 Fed. 570.

¹⁵United States v. McMahon, 164 U. S. 87, 41 L. ed. 357, 17 Sup. Ct. Rep. 28.

¹⁶United States v. Greenwald, 64 Fed. 6.

¹⁷United States v. Marshall, 6 Mackey, 34.

¹⁸United States v. Cobb, 43 Fed. 570.

¹⁹Ex parte Karstendick, 93 U. S. 396, 23 L. ed. 889.

²⁰Idem; see also Ex parte Brooks, 29 Fed. 85.

¹Gardes v. United States, 87 Fed. 172, 30 C. C. A. 596.

²In re Wilson, 18 Fed. 33; see also Idem, 114 U. S. 427, 29 L. ed. 93, 5 Sup. Ct. Rep. 935.

finding of the court that there is no suitable prison is conclusive and not reviewable on writ of habeas corpus.³

§ 1621. Attorney General to contract for subsistence, etc.

The Attorney General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined.

R. S. § 5547, U. S. Comp. Stat. 1901, p. 3724.

The above section was carried into the Revised Statutes from acts of 1864⁵ and 1872.⁶ Acts of 1891⁷ and 1901⁸ contain provisions for the employment of prisoners confined in United States penitentiaries. Since by the above section the subsistence of convicts is made a matter of contract, a State statute authorizing the use of county jails for the confinement of United States prisoners on certain terms is not binding on United States.⁹

§ 1622. When prisoners committed to house of correction or reformatory.

Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose.

R. S. § 5548, U. S. Comp. Stat. 1901 p. 3724.

The above section was originally enacted in 1835.¹¹ A provision from an act of 1891 upon this same subject is quoted under the next section.¹²

§ 1623. Confinement of juvenile offenders—expenses of transportation, etc.

Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be con-

³Ex parte Karstendick, 93 U. S. 402, 23 L. ed. 889; Ex parte Wilson, 114 U. S. 421, 29 L. ed. 90, 5 Sup. Ct. Rep. 935.

⁵Act May 12, 1864, c. 85, § 2, 13 Stat. 75.

⁶Act March 5, 1872, c. 30, § 1, 17 Stat. 35.

⁷Act March 3, 1891, c. 529, § 2, 26 Stat. 839.

⁸Act March 3, 1901, c. 853, § 1, 31 Stat. 1185.

⁹County of Lewis, etc. v. United States, 77 Fed. 733.

¹¹Act March 3, 1835, c. 40, § 5, 4 Stat. 777.

¹²Post, § 1623.

victed of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only, shall be paid by the Attorney General, out of the judiciary fund.

R. S. § 5549, U. S. Comp. Stat. 1901, p. 3725.

The above section was carried into the Revised Statutes from acts of 1865¹⁴ and 1872.¹⁵ The act of 1891 authorizing the building of Federal prisons declared that it "shall not apply to minors, who, in the judgment of the judges presiding over United States courts, shall be committed to reformatory institutions."¹⁶ The same act also provided in section nine thereof that "in the construction of the prison buildings provided for in this act there shall be such arrangement of cells and yard space as that prisoners under twenty years of age shall not be in any way associated with the prisoners above that age, and the management of the class under twenty years of age shall be as far as possible reformatory."

§ 1624. — Attorney General to designate houses of refuge and contract for subsistence.

The Attorney General shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence, and proper employment of all such juvenile offenders, and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the Attorney General.

R. S. 5550, U. S. Comp. Stat. 1901, p. 3725.

The section was carried into the Revised Statutes from acts of 1865¹⁷ and 1872.¹⁸

¹⁴Act March 3, 1865, c. 121, § 1, 26 Stat. 940, U. S. Comp. Stat. 1901, 13 Stat. 538.

¹⁵Act March 5, 1872, c. 30, § 1, 17 Stat. 538.

¹⁶Act March 3, 1891, c. 529, § 7, 18 Act March 5, 1872, c. 30 § 1, 17 Stat. 35.

§ 1625. Prisoners to be provided with money and clothes on discharge.

On the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed in the accounts of said prison with the United States: Provided, That this section shall not apply to persons sentenced to a term of imprisonment of less than six months.

§ 2 of act March 3, 1875, c. 145, 18 Stat. 480, U. S. Comp. Stat. 1901, p. 3722.

This provision was enacted at a time when all Federal prisoners were confined in State or Territorial prisons. A similar provision as to Federal prisons follows.

§ 1626. —similar provisions as to discharge from Federal prisons.

Every prisoner when discharged from the jail and prison shall be furnished with transportation to the place of his residence within the United States at the time of his commitment under sentence of the court, and if the term of his imprisonment shall have been for one year or more, he shall also be furnished with suitable clothing, the cost not to exceed twelve dollars, and five dollars in money.

§ 6 of act March 3, 1891, c. 529, 26 Stat. 840, U. S. Comp. Stat. 1901, p. 3727.

§ 1627. Removal of prisoners in case of contagion or epidemic.

The judge of any district court, within whose district any contagious or epidemic disease shall at any time prevail, so as, in his opinion, to endanger the lives of persons confined in the prison of such district, in pursuance of any law of the United States, may direct the marshal to cause the persons so confined to be removed to the next adjacent prison where such disease does not prevail, there to be confined until they may safely be removed back to the place of their first confinement. Such removals shall be at the expense of the United States.

R. S. § 4800, U. S. Comp. Stat. 1901, p. 3319.

The above section was first enacted in 1799.¹

¹Act Feb. 25, 1799, c. 12, § 5, 1 Stat. 620.

§ 1628. Provisions respecting Federal prisons.

In 1891³ provision was made for the erection of three Federal prisons two east and one west of the Rock Mountains "for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor by any court of the United States in any State, Territory or District under the jurisdiction of the Department of Justice of the United States." In 1895 provision was made for the transfer of the Fort Leavenworth military prison to the Department of Justice for prison purposes and in the following year for the erection of a penitentiary on the Fort Leavenworth reservation and the return of the military prison to the War Department.⁴ In 1898 the Federal jail at Fort Smith, Ark., was made a national prison for the confinement of persons convicted in the United States and commissioners' courts in Indian Territory and in the Texarkana division of the western district of Arkansas.⁵

Author's section.

§ 1629. Attorney General to supervise Federal prisons.

The control and management of said prisons [i. e. Federal prisons whose erection was authorized by the act of 1891 from which this is taken] shall be vested in the Attorney General who shall have power to appoint a superintendent, assistant superintendent, warden, keeper, and all other officers necessary for the safe-keeping, care, protection and discipline of such United States prisoners. He shall also have authority to promulgate such rules for the government of the officials of said prisons and prisoners as he may deem proper and necessary.

§ 4, act March 3, 1891, c. 529, 26 Stat. 839, U. S. Comp. Stat. 1901, p. 3726.

The above enactment is extended by a later act to the Fort Leavenworth prison¹ and similar provisions are contained in subsequent acts respecting the Fort Smith, Ark., jail,² and the Atlanta jail.³

³Act March 3, 1891, c. 529, 26 Stat. 839, U. S. Comp. Stat. 1901, p. 3725. ¹Act March 2, 1895, c. 189, § 1, 28 Stat. 957, U. S. Comp. Stat. 1901, p. 3728.

⁴See act March 2, 1895, c. 189, § 1, 2 Stat. 957; act June 10, 1896, c. 400, § 1, 29 Stat. 380, U. S. Comp. Stat. 1901, pp. 3728, 3729. ²Act May 17, 1898, c. 340, 30 Stat. 417, U. S. Comp. Stat. 1901, p. 3730.

⁵Act May 17, 1898, c. 340, 30 Stat. 417, U. S. Comp. Stat. 1901, p. 3730. ³Act March 3, 1901, c. 853, § 1, 31 Stat. 1185, U. S. Comp. Stat. 1901, p. 3731.

§ 1630. — to designate to which prisons convicts to be committed.

The Attorney General shall be authorized to designate to which of said prisons [i. e. the Federal prisons provided by the act⁵] persons convicted in such States or Territories [i. e. those under the jurisdiction of the Federal Department of Justice] shall be carried for confinement.

Part of § 9, act March 3, 1891, c. 529, 26 Stat. 840, U. S. Comp. Stat. 1901, p. 3728.

The remainder of this section of the act of 1891 is quoted in a note to a preceding section,⁶ and other portions of the act are embodied in other sections of this Code.⁷

§ 1631. — may transfer prisoners elsewhere to Federal penitentiary.

The Attorney General is authorized to transfer, in his discretion, to said United States penitentiary at Atlanta, Georgia, such persons now undergoing sentences of confinement, imposed by the United States courts, in other institutions, as can conveniently be accommodated therein.

Part of § 1, act of March 3, 1901, c. 853, 31 Stat. 1115, U. S. Comp. Stat. 1901, p. 3731.

The above is from one of the appropriation acts of 1901.

§ 1632. Employment of prisoners in Federal prisons.

The act of 1891 authorizing the erection of three Federal prisons provided for workshops for the convicts therein and that they be employed "exclusively in the manufacture of such supplies for the government as can be manufactured without the use of machinery," and further that the "prisoners shall not be worked outside the prison enclosure.⁹ The act appropriating the military prison at Fort Leavenworth as a penitentiary contained a somewhat similar provision.¹⁰ The act of 1896 for the erection of a new penitentiary at Fort Leavenworth provided for workshops therein and for the employment of convicts in its construction.¹¹ A pro-

⁵Ante, § 1628.

⁶Ante, § 1623.

⁷Ante, §§ 1610, 1627, 1628, 1629.

⁹Act March 3, 1891, c. 529, § 2, 26 Stat. 839, U. S. Comp. Stat. 1901, p. 3726.

¹⁰Act March 2, 1895, c. 189, § 1, 28 Stat. 957, U. S. Comp. Stat. 1901, p. 3728.

¹¹Act June 10, 1896, c. 400, 29 Stat. 380, U. S. Comp. Stat. 1901, p. 3729.

viso in an appropriation act of 1901 provided that convicts in the Federal prison at Atlanta might be employed "in the manufacture of articles and the production of supplies for said penitentiary; in the manufacture of supplies for the government that can be manufactured without the use of machinery; in the construction, extension and repairs of buildings and inclosures of the prison, and in making necessary materials therefor; and in the cultivation and care of the prison grounds and farm."¹²

Author's section.

¹²Act March 3, 1901, c. 853, § 1,
³¹Stat. 1185, U. S. Comp. Stat. 1901, *
p. 3731.

CHAPTER 50.

EXTRADITION.

- § 1642. Extradition of fugitives from the justice of a foreign country.
- § 1643. Extradition cases to be heard publicly.
- § 1644. Depositions and other papers as evidence at hearing.
- § 1645. —earlier provision of Revised Statutes.
- § 1646. Summoning and pay of witnesses of indigent defendants.
- § 1647. Surrender of fugitive and recapture after escape.
- § 1648. Person committed to be deported within two months or discharged.
- § 1649. Statutory provisions only operative while extradition treaty exists.
- § 1650. Persons extradited from foreign country—protection.
- § 1651. —agent receiving such persons to have powers of marshal.
- § 1652. —penalty for obstructing or resisting such agent.
- § 1653. Right of extradition between States.
- § 1654. Interstate extradition.
- § 1655. Penalty for resisting agent of demanding State.
- § 1656. Extradition of fugitives found in District of Columbia.
- § 1657. —associate justice of district supreme court may act.
- § 1658. Extradition between United States and Philippine Islands.
- § 1659. Certification of fees and costs in extradition cases.
- § 1660. Fees and costs of foreign extradition, how payable.

§ 1642. Extradition of fugitives from the justice of a foreign country.

Whenever there is a treaty or convention for extradition^{[a]-[c]} between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath,^[d] charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged,^[e] that he may be brought before such justice, judge,

or commissioner, to the end that the evidence of criminality may be heard and considered.^{[1]-[11]} If, on such hearing, he deems the evidence sufficient to sustain the charges under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made:^{[1]-[11]} Provided, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery; burglar, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and

who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title,¹ so far as applicable, shall govern proceedings authorized by this proviso: Provided further, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: And provided further, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

R. S. § 5270, as amended in 1901, U. S. Comp. Stat. 1901, p. 3591.

[a] History of provision and cross-references.

The amendment of 1900 consisted in the addition of the three provisos respecting crimes in foreign territory occupied by or under the control of the United States.² The first part of the section is from an act of 1848.³ The Revised Statutes provide elsewhere for the removal of offenders against the United States who are arrested in any district other than that where the offense was committed to the district where the offense was committed.⁴ The section applies to treaties passed subsequently to its enactment as well as those existing at the time of its enactment.⁵ Where the terms of the particular treaty admit of such construction, all crimes, whether committed anterior to the adoption of the treaty or not, are included in its operation.⁶

[b] Extradition in general.

Extradition is the surrender by one nation to another of an individual

¹See post, §§ 1645, 1647-1652.

⁴See ante, § 1541.

²Act June 6, 1900, c. 793, 31 Stat. 656.

⁵See *Castro v. De Uriarte*, 16 Fed. 93.

³Act Aug. 12, 1848, c. 167, § 1, 9 Stat. 302.

⁶In re *De Giacomo*, 12 Blatchf. 391, Fed. Cas. No. 3,747.

accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.⁸ It is the right of foreign governments and not of individuals;⁹ and it cannot be demanded by one nation of another as a matter of right in the absence of treaty stipulations.¹⁰ Whether the Federal government has a right to send back a fugitive from justice in the absence of treaty has been regarded as doubtful.¹¹ It is, however, the uniform practice to refuse surrender where no treaty exists.¹² The subject of intercourse being vested exclusively in the United States government, the States have no power to grant or cause the extradition of one of its citizens on the demand of a foreign power.¹³ The clause, "the jurisdiction of any such foreign government," has been held to refer to the personal jurisdiction of such government, and hence where by the law of Prussia that country has jurisdiction over an offense committed by one of its subjects in Belgium it may demand return of that subject by the United States where he has left Belgium and fled to this country.¹⁴

[c] Necessity for preliminary requisition and for executive mandate.

Requisition is not a necessary preliminary step to the issuing of warrant of arrest.¹⁶ And it has been held that the court need only examine the evidence of criminality and need not consider whether or not the foreign government authorized the application.¹⁷ Requisition is, however, necessary after the evidence has been certified to the Secretary of State.¹⁸ There is some question as to the necessity for a preliminary mandate from the Department of State to authorize a magistrate to entertain extradition proceedings.¹ An early decision held it necessary in all cases, whether the particular treaty contained any reference to preliminary mandate or not.² The rule, however, apparently is that such mandate is unnecessary,

⁸*Terlinden v. Ames*, 184 U. S. 289, 46 L. ed. 534, 22 Sup. Ct. Rep. 484. U. S. 289, 46 L. ed. 545, 22 Sup. Ct. Rep. 484.

⁹*In re Ferrelle*, 28 Fed. 878.

¹⁰*United States v. Rauscher*, 119 U. S. 412, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *Dos Santos Case*, 2 Brock, 493, Fed. Cas. No. 4,016; *United States v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *In re Metzger*, 5 How. 176, 12 L. ed. 104; *Ex parte McCabe*, 46 Fed. 371, 12 L.R.A. 589; *In re Sheazle*, 1 Woodb. & M. 68, Fed. Cas. No. 12,734.

¹¹*See United States v. Rauscher*, 119 U. S. 412, 30 L. ed. 425; 7 Sup. Ct. Rep. 234.

¹²*Op. Atty. Gen.* 432; *United States v. Rauscher*, 119 U. S. 412, 30 L. ed. 427, 7 Sup. Ct. Rep. 234; *See also Holmes v. Jennison*, 14 Pet. 574, 10 L. ed. 596; *Terlinden v. Ames*, 184

¹³*Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 596; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Cooper v. Galbraith*, 3 Wash. C. C. 546, Fed. Cas. No. 3,193.

¹⁴*In re Stupp*, 11 Blatchf. 124, Fed. Cas. No. 13,562; but see contra 14 *Op. Atty. Gen.* 281.

¹⁶*In re Mineau*, 45 Fed. 188; *In re Kaine*, 14 How. 103, 14 L. ed. 345; *In re Adutt*, 55 Fed. 376; *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

¹⁷*In re Dugan*, 2 Low. 367, Fed. Cas. No. 4,120.

¹⁸*Infra note.* [1]

¹*In re Kelly*, 26 Fed. 856.

²*Ex parte Kaine*, 3 Blatchf. 1, Fed. Cas. No. 7,597.

unless made obligatory by treaty.³ When made a prerequisite it should be set forth on the face of the warrant of arrest.⁴ The mandate itself need contain a statement of the offense in general terms only, importing that it is an offense within the treaty.⁵ The effect of the mandate is merely to authorize proceedings before the judiciary and a second mandate is not required on re-examination.⁶

[d] Complaint.

Any person authorized by the executive department of the foreign nation is a proper person to appear and file the complaint.⁸ It must be under oath before a duly authorized officer.⁹ If the complaint is made by a private individual, his authority to act should appear during the proceeding or the proceedings should be dismissed.¹⁰ The consular title appended to the signature of the complainant is held sufficient evidence of authority.¹¹ And it is held that this authority must appear on the face of the complaint.¹² It must appear also in the complaint that the commissioner is duly authorized to act in the case.¹³ The complaint, in order to give jurisdiction, need not have the precision of an indictment,¹⁴ but the substantial features of the offense must be clearly set forth.¹⁵ It is sufficient if it describes the offense in general terms such as are used in the treaty.¹⁶ Where the complainant has no personal knowledge of the facts he may make the complaint on information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment found in the foreign country, or a copy of depositions of witnesses having actual knowledge of the facts.¹⁷ An averment that a warrant was issued in the foreign country is unnecessary,¹⁸ such warrant not being a necessary preliminary to an investigation in this country.¹⁹

³In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887; Castro v. De Uriarte, 16 Fed. 96; In re Orpen, 86 Fed. 760; see also In re Farez, 7 Blatchf. 46, Fed. Cas. No. 4,644; In re Macdonnell, 11 Blatchf. 83, Fed. Cas. No. 8,771; In re Kelley, 2 Low. 339, Fed. Cas. No. 7,655; Ex parte Ross, 2 Bond, 252, Fed. Cas. No. 12,069.

⁴In re Farez, 7 Blatchf. 46, Fed. Cas. No. 4,644.

⁵In re Grin, 112 Fed. 798.

⁶In re Kelly, 26 Fed. 856; In re Fergus, 30 Fed. 607.

⁸In re Kelly, 26 Fed. 856; In re Ferrelle, 28 Fed. 878; In re Orpen, 86 Fed. 762.

⁹Ex parte McCabe, 46 Fed. 363, 12 L.R.A. 589; Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98.

¹⁰In re Ferrelle, 28 Fed. 878; see also In re Herris, 33 Fed. 165.

¹¹In re Grin, 112 Fed. 790.

¹²In re Herris, 32 Fed. 583.

¹³Ex parte Lane, 6 Fed. 34; In re Kelley, 25 Fed. 268.

¹⁴In re Adutt, 55 Fed. 376.

¹⁵In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; In re Van Hoven, 4 Dill, 411, Fed. Cas. No. 16,838; see also Ex parte Hibbs, 26 Fed. 421.

¹⁶Castro v. DeUriarte, 16 Fed. 93; In re Roth, 15 Fed. 506.

¹⁷Rice v. Ames, 180 U. S. 375, 45 L. ed. 582, 21 Sup. Ct. Rep. 406; Ex parte Lane, 6 Fed. 34; see also In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645; In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369.

¹⁸In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

¹⁹In re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13,887.

[e] Warrant of arrest.

A complaint duly sworn to is a prerequisite to the issuance of the warrant of arrest.¹ The authority of the commissioner or judge must appear on the face of the warrant;² and it must appear that the jurisdiction has been regularly invoked for the arrest of the alleged fugitive.³ A second warrant may be issued where the first was of doubtful regularity.⁴ In a case arising under the extradition treaty with Prussia it was held that the warrant may run throughout the United States and may be executed in any district.⁵ This, however, has been denied in a recent case arising under the treaty with Great Britain, the terms of which, as to the point in question, are identical with that of the Prussian treaty.⁶ The warrant of arrest, like the complaint, need describe the offense in general terms only, such as are used in the treaty.⁷

[f] Hearing.

Another section provides for the evidence that may be received at the hearing.⁹ The proceedings before the magistrate are not to be conducted in the technical manner of a jury trial.¹⁰ Thus the failure of accused to account for money which he received for a municipality is sufficient proof of embezzlement and it is immaterial whether the amount unaccounted for is greater or less than the amount charged.¹¹ In the treaty with San Salvador, however, it is expressly provided that the fugitive shall be delivered up only on such evidence of criminality as, according to the law of the place where found, would justify his commitment for trial if the crime had been there committed.¹² A similar provision is embodied in the treaty with Mexico;¹³ and in the treaty with Russia.¹⁴ Aside from the treaties just referred to and other treaties containing similar provisions, the amount of proof necessary to justify the magistrate in committing the prisoner is not clear, an early case holding that no magistrate should order a surrender unless on proof sufficient to warrant a conviction in his judgment.¹⁵ On the other hand it has been held sufficient if probable cause exists for believing the defendant guilty.¹⁶ The decision, however, rests with the commissioner or other magistrate and his decision on the weight of proof will not be interfered with.¹⁷

¹Ex parte McCabe, 46 Fed. 363, 12 L.R.A. 589.

²Ex parte Lane, 6 Fed. 36; In re Kelley, 25 Fed. 270; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16,409; In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771.

³In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771.

⁴In re Fergus, 30 Fed. 607.

⁵See In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369.

⁶In re Walshe, 125 Fed. 572.

⁷Castro v. DeUriate, 16 Fed. 93;

In re Macdonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771.

⁹Post, § 1644.

¹⁰In re Breen, 73 Fed. 458.

¹¹Idem.

¹²In re Ezeta, 62 Fed. 972.

¹³Benson v. McMahon, 127 U. S. 462, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

¹⁴In re Grin, 112 Fed. 793.

¹⁵Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7,597.

¹⁶United States v. Piazza, 133 Fed. 999.

¹⁷Infra, note.[b]

The magistrate may adjourn the hearing and the prisoner is not entitled to habeas corpus where the length of the adjournment is not abused.¹⁸ The magistrate also may, in his discretion, refuse to grant an adjournment to enable the accused to procure depositions from the foreign country in order to show an alibi.¹⁹ In the absence of legislation the courts are without power to admit the arrested person to bail.²⁰ The jurisdiction of the commissioner to hear and consider the evidence and make the certificate is not dependent upon the fact that he issued the warrant of arrest.¹

[g] Mode of arrest no defense.

The prisoner cannot set up his mode of capture by way of defense.³ Thus, where the defendant has fled from British territory and was arrested on a British ship in the waters of the United States, such arrest was held good and the prisoner was refused habeas corpus.⁴ So also where the accused was brought into this country on a government vessel and was refused permission to land at a foreign port, such facts do not effect the question of jurisdiction.⁵

[h] Review of proceedings.

The officer issuing the warrant of arrest is authorized under the above section to hear the evidence in the case and to certify his findings to the Secretary of State;⁷ and no right is given to any other tribunal to review the sufficiency of the evidence.⁸ Hence on a writ of habeas corpus, after preliminary trial, the court cannot inquire into the sufficiency of the facts, but only whether the committing magistrate had jurisdiction of the subject-matter, and of the accused, whether the offense charged is within the subject-matter of the treaty, and whether the magistrate had competent legal evidence on which to exercise his judgment.⁹ In other words, the judgment of such magistrate, rendered in good faith on legal

¹⁸In re Ludwig, 32 Fed. 774; In re McDonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771.

¹⁹In re Wadge, 16 Fed. 332, 21 Blatchf. 300.

²⁰In re Wright, 123 Fed. 463.

¹Grin v. Shine, 187 U. S. 181, 47 L. ed. 131, 23 Sup. Ct. Rep. 98.

³In re Ezeta, 62 Fed. 965.

⁴In re Newman, 79 Fed. 626.

⁵In re Ezeta, 62 Fed. 964.

⁷In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563.

⁸In re Luis Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; Ornelas v. Ruiz, 161 U. S. 508, 40 L. ed. 789, 16 Sup. Ct. Rep. 689; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 278, 43 L. ed. 541, 22 Sup. Ct. Rep. 484;

Grin v. Shine, 187 U. S. 181, 47 L. ed. 131, 23 Sup. Ct. Rep. 98; In re Vandervelpen, 14 Blatchf. 137, Fed. Cas. No. 16,844; In re Krojanker, 44 Fed. 482; In re Behrendt, 22 Fed. 699, 23 Blatchf. 430.

⁹Ornelas v. Ruiz, 161 U. S. 508, 40 L. ed. 789, 16 Sup. Ct. Rep. 689; Bryant v. United States, 167 U. S. 105, 42 L. ed. 95, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 278, 46 L. ed. 541, 22 Sup. Ct. Rep. 484; In re Lantree, 102 Fed. 879; see also Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; In re Luis Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; Fong Yue Ting v. United States, 149 U. S. 714, 37 L. ed. 913, 13 Sup. Ct. Rep. 1016.

evidence, that the accused is guilty, cannot be reviewed on the weight of evidence, and is final, unless clearly erroneous in law.¹⁰ An early case, however, held that where the prisoner has been convicted on re-examination on no clearer testimony than was presented on the first trial, the circuit court has power to review the testimony and correct the error.¹¹

[i] Proceedings in executive department.

The executive department is the final tribunal in extradition matters and the Secretary of State may rule that the offense on which the accused is held is political or does not come within the terms of the treaty.¹² Such a holding concludes all further inquiry by the courts.¹³ It is held also that the executive may refuse to surrender the prisoner on the ground that the evidence is not sufficient to establish criminality.¹⁴ If the magistrate certifies that the offense is extraditable and finds the evidence of criminality, requisition is necessary before warrant for the surrender of the accused issues. The requisition should come from the supreme political authority of the demanding State, and be addressed to the Secretary of State.¹⁵ It need not be founded on an indictment.¹⁶

[j] Discharge and rearrest.

Where the prisoner has been discharged on insufficiency of evidence he may again be arrested and compelled to submit to a second examination.¹⁷ A second warrant has also been issued on a second complaint where the form of the first warrant was doubtful.¹⁸

§ 1643. Extradition cases to be heard publicly.

All hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, in a room or office easily accessible to the public.

§ 1 of act Aug. 3, 1882, c. 378, 22 Stat. 215, U. S. Comp. Stat. 1901, p. 3593.

§ 1644. Depositions and other papers as evidence at hearing.

In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of

¹⁰*Ornelas v. Ruiz*, 161 U. S. 509, 40 L. ed. 790, 16 Sup. Ct. Rep. 689; *Terlinden v. Ames*, 184 U. S. 279, 46 L. ed. 541, 22 Sup. Ct. Rep. 484; see also *In re Krojanker*, 44 Fed. 482.

¹¹*In re Kelly*, 26 Fed. 852.

¹²*In re Kelly*, 26 Fed. 854; *In re Vandervelpen*, 14 Blatchf. 137, Fed. Cas. No. 16,844.

¹⁴*In re Kelly*, 26 Fed. 854.

¹⁵*In re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563.

¹⁶*In re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369.

¹⁷*In re Sheazle*, 1 W. & M. 66, Fed. Cas. No. 12,734; *In re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887.

¹⁹*In re Kelly*, 26 Fed. 852; *In re Macdonnell*, 11 Blatchf. 170, Fed. Cas. No. 8,772.

²⁰*In re Fergus*, 30 Fed. 607.

the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing, for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper, or copies thereof, so offered, are authenticated in the manner required by this act.

§ 5 of act Aug. 3, 1882, c. 378, 22 Stat. 216, U. S. Comp. Stat. 1901, p. 3595.

The above section supersedes R. S. § 5271, so far as inconsistent therewith.¹ Under this section both the depositions and the copies thereof require the same identification, and neither is admissible in evidence unless it would be receivable in the foreign country in proof of criminality.² If the United States consul in the foreign country certifies that they are authenticated so as to be entitled to be used as evidence there, that shall be deemed conclusive.³ Such certificate cures defects in the other certificates in the case, if there be any.⁴ The power of authentication rests also in the vice consul;⁵ and the courts will take judicial notice that he is the chief consular officer in the absence of his principal.⁶ The words "for similar purposes" as used in the above section mean "as evidence of criminality."⁷

The certificate of the consular officer is not the exclusive source of authentication and oral or other evidence may be brought in.⁸ The consular certificate is sufficient if it follows the wording of the above section.⁹ It need not appear that the depositions or documentary evidence would be competent evidence on the trial of the accused in the foreign country, if sufficient to cause his arrest.¹⁰ The above section, however, applies only to those papers offered in evidence by the prosecution to establish guilt, and not to papers offered on the part of the accused.¹¹

¹Post, § 1645.

²In re McPhun, 30 Fed. 57.

³Idem; In re Fowler, 4 Fed. 303, 18 Blatchf. 430; In re Wadge, 16 Fed. 332.

⁴In re Behrendt, 22 Fed. 699; In re Krojanker, 44 Fed. 482.

⁵In re Herris, 33 Fed. 165.

⁶In re Orpen, 86 Fed. 760.

⁷In re Luis Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; In re Grin, 112 Fed. 790.

⁸In re Benson, 34 Fed. 649; In re Wadge, 16 Fed. 332; In re Wadge, 15 Fed. 864; In re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; see also In re Fowler, 4 Fed. 303, 18 Blatchf. 430.

⁹Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98; In re Krojanker, 44 Fed. 482.

¹⁰In re Wadge, 16 Fed. 332.

¹¹In re Luis Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031.

§ 1645. — earlier provision of Revised Statutes.

In every case of a complaint and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section.

R. S. § 5271, U. S. Comp. Stat. 1901, p. 3593.

A subsequent provision in an act of 1882 embodied in the preceding section of this Code¹³ covers the same subject and that act expressly repeals R. S. § 5271 so far as inconsistent with its provisions.¹⁴ The section was amended in 1876,¹⁵ but the act of 1882 mentioned above expressly repealed that amendment.

§ 1646. Summoning and pay of witnesses of indigent defendants.

On the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.

§ 3 of act Aug. 3, 1882, c. 378, 22 Stat. 215, U. S. Comp. Stat. 1901, p. 3594.

The fourth section of the act of 1882 provides for the payment of fees in extradition proceedings and is given elsewhere.¹⁷ The term "trial" as

¹³Ante, § 1644.

¹⁴See *In re McPhun*, 30 Fed. 60.

¹⁵Act June 19, 1876, c. 133, 19 Stat. 430.

59. For a construction of the section

as it stood amended by this act see

In re Fowler, 4 Fed. 303, 18 Blatchf.

¹⁷Ante, § 742.

used in the above section does not give a right to a full trial, but refers only to a preliminary hearing.¹⁸

§ 1647. Surrender of fugitive and recapture after escape.

It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape.

R. S. § 5272, U. S. Comp. Stat. 1901, p. 3595.

The above section was carried into the Revised Statutes from an act of 1848.¹⁹ Persons may be surrendered under a treaty made after the crime was committed, and after their arrival in this country.²⁰ In many of the extradition treaties it is provided that surrender will not be made if the fugitive is a citizen of the United States or if he has committed another crime in the United States. In the latter case surrender will not be made until he has been tried, convicted and suffered punishment, or acquitted.¹

§ 1648. Person committed to be deported within two months or discharged.

Whenever any person who is committed under this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been

¹⁸In re Wadge, 15 Fed. 864.

²⁰In re De Giacomo, 12 Blatchf.

¹⁹Act Aug. 12, 1848, c. 167, § —, 9 391, Fed. Cas. No. 3,747.

Stat. 302; In re Kaine, 14 How. 103, ¹In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

R. S. § 5273, U. S. Comp. Stat. 1901, p. 3596.

The above section was originally enacted in 1848.³ The fact that an officer of the demanding country is on his way to get the prisoner is no ground for refusing discharge where the prisoner has been detained for more than two months, and where it is shown that had the officer of the demanding State exercised due diligence he might have arrived in time.⁴

§ 1649. Statutory provisions only operative while extradition treaty exists. ♦

The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer.

R. S. § 5274, U. S. Comp. Stat. 1901, p. 3596.

The above section was carried forward into the Revised Statutes from an act of 1848.⁵

§ 1650. Persons extradited from foreign country—protection.

Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime for which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

R. S. § 5275, U. S. Comp. Stat. 1901, p. 3596.

The above section was originally enacted in 1869.⁶ A person extradited and brought to the United States cannot be arrested for any offense except

³Act Aug. 12, 1848, c. 167, § 4, 9 Stat. 303.

⁴In *re Dawson*, 101 Fed. 253.

⁵Act Aug. 12, 1848, c. 167, § 5, 9 Stat. 303.

⁶Act March 3, 1869, c. 141, § 1, 15 Stat. 337.

that for which he was extradited, until the lapse of a reasonable time after the termination of the extradition proceedings.⁹ This applies to a subsequent arrest in a civil action as well as to an arrest for crime;¹⁰ and the privilege of exemption cannot be waived by the prisoner.¹¹ When arrested for another offense habeas corpus will issue,¹² and in such case the State and Federal courts have concurrent jurisdiction.¹³ Extradition from a foreign country, although for a crime committed against the law of a State, must be negotiated through the Federal government.¹⁴ The irregularity of extradition proceedings cannot be questioned at trial after surrender.¹⁵

§ 1651. — agent receiving such persons to have powers of marshal.

Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

R. S. § 5276, U. S. Comp. Stat. 1901, p. 3597.

The above section was originally enacted in 1869.¹⁷

§ 1652. — penalty for obstructing or resisting such agent.

Every person who knowingly and wilfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year.

R. S. § 5277, U. S. Comp. Stat. 1901, p. 3597.

The above section was originally enacted in 1869.¹⁹

⁹United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; In re Reinitz, 39 Fed. 204, 4 L.R.A. 236; see also In re Baruch, 41 Fed. 472.

¹⁰In re Reinitz, 39 Fed. 204, 4 L. R.A. 236.

¹¹Ex parte Coy, 32 Fed. 916.

¹²Ex parte Coy, 32 Fed. 916.

¹³Idem.

¹⁴United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

¹⁵Kerr v. Illinois, 119 U. S. 441, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

¹⁷Act March 3, 1869, c. 141, § 2, 15 Stat. 338.

¹⁹Act March 3, 1869, c. 141, § 3, 15 Stat. 338.

§ 1653. Right of extradition between States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

Const. art. IV. § 2, cl. 2.

In 1793 Congress passed an act for the purpose of giving effect to the above provision.¹ The first and second sections of that act have been carried forward into R. S. §§ 5278, 5279, reproduced in following sections of this Code.² The term "charged with crime" as used in this and the following section is used in its broad sense and includes all persons accused of crime by legal proceedings.³ The "charge" continues until such person is tried and acquitted, or if convicted, until sentence has been performed.⁴ While the manner of the exercise of the power of interstate extradition is derived from the laws and Constitution of the United States⁵ and hence the State governors are compelled to rely on Federal laws for authority to act,⁶ nevertheless State legislation in the aid of Federal enactments is not objectionable⁷ when not in conflict therewith.⁸

State courts have concurrent jurisdiction with Federal courts in extradition matters.⁹ But the judgments of a State court are not necessarily decisive and do not conclude the Federal courts, although they are entitled to great respect and are strongly advisory.¹⁰

§ 1654. Interstate extradition.

Whenever the executive authority of any State or Territory demands^{[a]-[b]} any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime,^[c] certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has

¹See *Robb v. Connolly*, 111 U. S. 628, 28 L. ed. 542, 4 Suu. Ct. Rep. 544; *Lascelles v. Georgia*, 148 U. S. 540, 37 L. ed. 550, 13 Sup. Ct. Rep. 687.

²Post, §§ 1654, 1655.

³*Hughes v. Pflanz*, 138 Fed. 981.

⁴*Hughes v. Pflanz*, 138 Fed. 980.

⁵*Ex parte Morgan*, 20 Fed. 298.

⁶*State v. Justus*, 84 Minn. 237, 87 N. W. 770, 55 L.R.A. 325; see also *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968.

⁷*Ex parte Ammons*, 34 Ohio St. 518; *State v. Shelton*, 79 N. C. 605.

⁸*Commonwealth v. Tracy*, 5 Met. 536.

⁹*Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; *Roberts v. Reilly* 116 U. S. 94, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *In re Roberts*, 24 Fed. 132; see also *Ex parte Brown*, 28 Fed. 654. But see contra *In re Robb*, 19 Fed. 26, 9 Sawy. 568.

¹⁰*In re Roberts*, 24 Fed. 132.

fled,^[d] it shall be the duty of the executive authority of the State or Territory to which such person has fled^[e] to cause him to be arrested and secured,^{[f]-[g]} and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

R. S. § 5278, U. S. Comp. Stat. 1901, p. 3597.

[a] In general.

This provision was enacted for the purpose of carrying out the constitutional provision set forth in the previous section.¹² It provides for a method summary in its effect and must therefore be strictly complied with.¹³ Hence the power cannot be exercised by the State executive on the ground of comity.¹⁴ While the demand of a governor of a territory is binding on the governor of a State or other Territory, the Cherokee Nation is not a Territory within the meaning of the above section and a demand by its executive will not be honored.¹⁵ Territories are in the same position as States in regard to interstate extradition, and the executive of a Territory has the same rights and is subject to the same duties as is the executive of a State.¹⁶

[b] Demand or requisition.

The executive is not authorized to make a demand unless the party has been charged in the regular course of judicial proceedings.¹⁷ Though the requisition does not show on its face that it was based on an original proceeding in a proper court of the demanding State, it is nevertheless sufficient if it refers to papers annexed to it and certified to be correct, which do show that fact.¹⁸ But the mere recital in the requisition that an indictment duly authorized is annexed is of no avail, there being no such indictment.¹⁹ A certified copy of the laws of the demanding State need not accompany the requisition;²⁰ and it is not invalidated by the absence of

¹²See *Hughes v. Pflanz*, 138 Fed. 104; 16 L. ed. 717; see also *Ex parte Morgan*, 20 Fed. 308; *Malcolmson v. Scott*, 56 Mich. 459, 23 N. W. 166.

¹³*Ex parte Morgan*, 20 Fed. 298.

¹⁴*Idem*.

¹⁵*Ex parte Morgan*, 20 Fed. 298.

¹⁶*Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148;

Ex parte Morgan, 20 Fed. 298.

¹⁷*Kentucky v. Dennison*, 24 How.

¹⁸*In re White*, 45 Fed. 237.

¹⁹*Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L.R.A. 801.

²⁰*Roberts v. Reilly*, 116 U. S. 96, 29 L. ed. 549, 6 Sup. Ct. Rep. 291.

the seal of the demanding State.¹ Under the above section extradition proceedings may be based on a verified complaint or affidavit as well as on an indictment.²

While a requisition usually precedes an arrest, many States have by statute authorized the detention of the fugitive for a reasonable period, so that the governor of the State from which the fugitive has come may make requisition.³

[c] Treason, felony or other crime.

"Treason, felony or other crime" embraces every offense known to the laws of the demanding State, including misdemeanors;⁵ and when the fugitive is once brought into the jurisdiction of the demanding State he apparently may be tried for any offense whatever, whether committed before or after extradition.⁶ The demanding State has jurisdiction whether the fugitive is brought within its borders by unlawful force or by legal process.⁷

[d] Indictment or affidavit necessary.

Indictment found or affidavit made are essentials to extradition under the section, and representations of the executive of the demanding State are of no effect unless supported by a copy of one or the other of such documents,⁸ authenticated by the executive of the demanding State.⁹ An information duly authenticated is not an equivalent to an indictment, and a fugitive will not be surrendered on such information even though it recites the filing of an indictment and directs a warrant to issue for the arrest of the defendant.¹⁰ It has been held, however, by a State court that the statute cannot be intended to exclude a case where the charge is in the form of a criminal information since all offenses under the laws of the State were triable by information, and it is presumable that the laws of the demanding State authorized prosecutions by information.¹¹ If the indictment is substantially according to the laws of the demanding State it can-

¹In re Baker, 21 Wash. 259, 57 Pac. 827.

²In re Strauss, 126 Fed. 327, 63 C. C. A. 99.

³Rea v. Smith, 2 Handy, (O.) 193; State v. Burchinal, 4 Harr. (Del.) 572; Morrell v. Quarles, 35 Ala. 544; In re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Ex parte Romaines, 1 Utah, 23.

⁵Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287.

⁶United States v. Johnson, 1 N. J. L. J. 162, 25 Fed. Cas. No. 15487.

Lascelles v. Georgia, 148 U. S. 543, 37 L. ed. 549, 13 Sup. Ct. Rep. 687.

⁷Idem; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; Kerr v. Illinois, 119 U. S. 444, 30 L. ed. 424, 7 Sup. Ct. Rep. 225; United States v. Johnson, 1 N. J. L. J. 162, Fed. Cas. No. 15,487; but see In re Fitton, 45 Fed. 471.

⁸Ex parte Morgan, 20 Fed. 298; In re Doo Woon, 18 Fed. 898, 9 Sawy. 417.

⁹Ex parte Morgan, 20 Fed. 298.

¹⁰Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L.R.A. 801.

¹¹In re Hooper, 52 Wis. 699, 58

not be objected that it is not technically correct;¹³ or that it would not be good in the State where the accused was found.¹⁴

The affidavit, when this form of evidence is adopted, must be explicit and certain so that if it were laid before a magistrate it would justify him in committing the accused to answer the charge.¹⁵ It is not sufficient if founded on belief or information.¹⁶ The affidavit must clearly allege that the accused committed a crime in the State which demands his return.¹⁷ The statute must be strictly complied with and authentication by the secretary of state of the demanding State has been held insufficient.¹⁸

[e] Investigation by executive.

It must appear to the executive before he can comply with the demand for the return of the fugitive, first: that the person demanded is substantially charged with a crime against the laws of the State from which he has fled, by an indictment or affidavit properly authenticated, and second: that the person demanded is a fugitive from the justice of the demanding State.¹ Whether or not the person demanded is a fugitive from justice is a question of fact which the executive of the asylum State must decide on such evidence as he may deem satisfactory.² The investigation by the executive is purely *ex parte*, the person demanded having no right to be heard.³ The term "duty of the executive" as used in the above section is not mandatory, but declaratory of the moral duty created, and the Constitution and laws of the United States have provided no means of compelling him to make the surrender.⁴ The duty, however, is an absolute one,⁵ and exists even where the fugitive was induced to come into

¹³*Ex parte Reggel*, 114 U. S. 651, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Pearce v. State*, 155 U. S. 313, 39 L. ed. 167, 15 Sup. Ct. Rep. 116; see also *In re Strauss*, 126 Fed. 330, 63 C. C. A. 99.

¹⁴*Webb v. York*, 79 Fed. 616, 25 C. C. A. 133.

¹⁵*Ex parte Morgan*, 20 Fed. 298.

¹⁶*Idem*; see also *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; *Ex parte Smith*, 3 McLean, 133, Fed. Cas. No. 12,968.

¹⁷*Ex parte Smith*, 3 McLean, 133, Fed. Cas. No. 12,968.

¹⁸*Soloman's Case*, 1 Abb. Pr. N. S. 347.

¹*Hyatt v. People*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; *In re Strauss*, 126 Fed. 329, 63 C. C. A. 99; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 95, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; *State v. Jackson*, 36 Fed. 258, 1 L. R. A. 370; *Ex parte*

Brown, 28 Fed. 655; *Ex parte McKean*, 3 Hughes, 23, Fed. Cas. No. 8,848.

²*Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Hyatt v. People*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; *Roberts v. Reilly*, 116 U. S. 95, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; see also *In re Cook*, 49 Fed. 838. The fact that a person does not believe he has committed a crime when leaving a state, does not make him the less a fugitive: *Appleyard v. Mass.* 203 U. S. —, 51 L. ed. — (Adv. op. p. 122).

³*In re Cook*, 49 Fed. 838. See the recent case of *Pettibone v. Nichols*, 203 U. S. —, 51 L. ed. — (Adv. op. p. 111 et seq.), holding that clandestine proceedings for deportation violated no Federal right.

⁴*Kentucky v. Dennison*, 24 How. 107, 16 L. ed. 717; *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287.

⁵*Kentucky v. Dennison*, 24 How. 107, 16 L. ed. 717.

the jurisdiction by fraud of private persons, but which does not amount to a crime.⁶

[f] Warrant of arrest and removal—requisites of warrant.

The statute is silent as to the means by which the fugitive is "to be arrested and secured," and the means therefore may be provided by the State legislature.⁸ Thus, where a governor's warrant is required by statute to be under seal, a warrant issued without seal is void.⁹ A warrant improperly issued is apparently revocable,¹⁰ though not after the removal of the fugitive,¹¹ and a second one may be issued¹² without another requisition on the part of the demanding governor.¹³ The warrant for the arrest and return of the fugitive must recite or set forth the evidence necessary to authorize the State executive to issue it;¹⁴ and a warrant failing to do so will be held void.¹⁵ The warrant need not, however, set forth the evidence in full¹⁶ and it is held to be sufficient if it recites what the law requires.¹⁷ It is held the warrant need not show that the offense charged was an offense against the laws of the demanding State.¹⁸

[g] Review of proceedings on habeas corpus.

Upon arrest by virtue of the warrant of the executive, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and he may invoke the judgment of the courts by writ of habeas corpus.¹⁹ Just how far the courts may go in reviewing the decision of the executive is not clear. On the question of fact as to whether or not the prisoner was a fugitive, it would seem that the executive's warrant of arrest is *prima facie* proof that the prisoner is such a fugitive.¹ It is not conclusive, however, and the decision of the executive on that point is held to be reviewable.² Late cases declare that where the governor's decision is made after a hearing and on conflicting evidence, it will not be reversed.³ Where the affidavit as to the prisoner

⁶Ex parte Brown, 28 Fed. 653.

⁸Ex parte Ammons, 34 Ohio St. 518; State v. Shelton, 79 N. C. 605; Robinson v. Flanders, 29 Ind. 10.

⁹Vallad v. Sheriff, 2 Mo. 26.

¹⁰Work v. Corrington, 34 Ohio St. 64; 32 Am. Rep. 345.

¹¹State v. Toole, 69 Minn. 104, 65 Am. St. Rep. 553, 38 L.R.A. 224, 72 N. W. 53.

¹²In re Hughes, Phil. L. (N. C.) 57.

¹³Ex parte Hobbs, 32 Tex. Crim. 312, 40 Am. St. Rep. 782, 22 S. W. 1035.

¹⁴In re Doo Woon, 18 Fed. 898; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968.

¹⁵In re Doo Woon, 18 Fed. 898.

¹⁶Ex parte Stanley, 25 Tex. App. Fed. Proc.—86.

377, 8 Am. St. Rep. 440, 8 S. W. 645, Bruce v. Rayner, 124 Fed. 481.

¹⁷People v. Donahue, 84 N. Y. 438.

¹⁸Ex parte Stanley, 25 Tex. App. 377, 8 Am. St. Rep. 440, 8 S. W. 645.

¹⁹Roberts v. Reilly, 116 U. S. 94, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

¹Hyatt v. People, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; Roberts v. Reilly, 116 U. S. 95, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; In re Keller, 36 Fed. 686; In re Cook, 49 Fed. 839; Eaton v. West Virginia, 91 Fed. 760, 34 C. C. A. 68; Bruce v. Rayner, 124 Fed. 481.

²In re Cook, 49 Fed. 839; see also Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968.

³Hyatt v. People, 188 U. S. 711, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; In re Strauss, 126 Fed. 330, 63 C. C.

being a fugitive is false he may be set free on habeas corpus.⁴ The fact of the executive issuing the warrant of arrest and removal is not conclusive proof that he had the necessary papers and that question is open to the courts on habeas corpus.⁵ It is held, however, in an early case that the warrant is conclusive proof that the party named stands charged with a crime in the demanding State.⁶ Whether the indictment or affidavit which accompanies the requisition substantially charges a crime is a question of law and open to judicial inquiry on habeas corpus.⁷ The court, however, will not deny extradition on matters of technical irregularity, if a crime is substantially set forth.⁸ The question of identity of the alleged fugitive is always open on habeas corpus.⁹ But the question of the actual guilt or innocence of the accused cannot be considered.¹⁰ After the fugitive is delivered up, tried and convicted, the legality of his extradition will not be reviewed on habeas corpus.¹¹

§ 1655. Penalty for resisting agent of demanding State.

Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.

R. S. § 5279, U. S. Comp. Stat. 1901, p. 2598.

The above section was carried into the Revised Statutes from an act of 1793.¹² The agent of the demanding State is not a Federal officer, although exercising an authority derived from United States laws; hence on habeas corpus before a State tribunal he may be compelled to produce the body of the alleged fugitive.¹⁴ Such agent, while acting within the scope of the authority conferred by this section, incurs no personal responsibility therefor.¹⁵

A. 99; *Bruce v. Rayner*, 124 Fed. 481; see also *ex parte Brown*, 28 Fed. 654.

⁴*Tennessee v. Jackson*, 36 Fed. 258, 1 L.R.A. 370.

⁵*Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L.R.A. 801.

⁶*In re Leary*, 10 Ben. 216, Fed. Cas. No. 8,162; but see *Ex parte Slauson*, 73 Fed. 666.

⁷*Roberts v. Reilly*, 116 U. S. 96, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; see *In re Strauss*, 126 Fed. 330, 63 C. C. A. 99.

⁸See *In re Roberts*, 24 Fed. 132.

⁹*In re Leary*, 10 Ben. 197, Fed. Cas. No. 8,162; *In re White*, 55 Fed. 54, 5 C. C. A. 29.

¹⁰*In re Roberts*, 24 Fed. 132; *In re White*, 55 Fed. 54, 5 C. C. A. 29; *United States v. Greene*, 100 Fed. 945.

¹¹*Eaton v. West Virginia*, 91 Fed. 760, 34 C. C. A. 68.

¹²Act Feb. 12, 1793, c. 7, § 2, 1 Stat. 302.

¹⁴*Robb v. Connolly*, 111 U. S. 635, 28 L. ed. 545, 4 Sup. Ct. Rep. 544.

¹⁵*In re Titus*, 8 Ben. 411, Fed. Cas. No. 14,062.

§ 1656. Extradition of fugitives found in District of Columbia.

In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Justice of the Supreme Court of the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine, title sixty-six, of the Revised Statutes of the United States, "Extradition," and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

District of Columbia Code, § 930, 31 Stat. —

§ 1657. — associate justice of district supreme court may act.

Any associate justice of said court shall have like power, in case of the illness, absence or other disability of the chief justice or when any such application shall be certified to him by the chief justice.

District of Columbia Code, § 931, 31 Stat. —.

§ 1658. Extradition between United States and Philippine Islands.

The provisions of sections fifty-two hundred and seventy eight and fifty-two hundred and seventy-nine¹⁷ of the Revised Statutes, so far as applicable, shall apply to the Phillipine Islands, which, for the purposes of said sections, shall be deemed a Territory within the meaning thereof.

§ 2 of act Feb. 9, 1903, c. 529, 32 Stat. 806, U. S. Comp. Stat. 1905, p. 164.

§ 1659. Certification of fees and costs in extradition cases.

All witness fees and costs of every nature in cases of extradition, including the fees of the commissioner. shall be certified by the judge or commissioner before whom the hearing takes place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause

¹⁷Ante, §§ 1654, 1655.

the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

§ 4 of act Aug. 3, 1882, c. 378, 22 Stat. 216, U. S. Comp. Stat. 1901, p. 3595.

The above provision is superseded so far as providing the mode of payment by a clause in an act of 1903 contained in the next following section of this Code.¹⁹

§ 1660. Fees and costs of foreign extradition, how payable.

From and after June 30, 1903, all the fees and costs in extradition cases shall be paid out of the appropriations to defray the expenses of the judiciary, and the Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

Part of § 1, act June 28, 1902, c. 1301, 32 Stat. 475, U. S. Comp. Stat. 1905, p. 160.

The above is from the sundry civil appropriation act for the fiscal year ending June 30, 1903. The provision of the act of 1882, found in the preceding section,²⁰ is largely superseded by this section.

¹⁹Post, § 1660.

²⁰Ante, § 1659.

CHAPTER 51.

HABEAS CORPUS.

- § 1669. When writ may be suspended.
- § 1670. Supreme Court, circuit and district courts may issue writ.
- § 1671. Power of circuit court of appeals to issue.
- § 1672. Issue of writ by Porto Rico courts.
- § 1673. Power of judges to issue.
- § 1674. Rules limiting issuance of writ where prisoner in jail.
- § 1675. Form of application for writ.
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- § 1682. Summary hearing and disposition of party.
- § 1683. Notice to State's attorney when State prisoner claims exemption under international law.
- § 1684. To what courts appeals taken.
- § 1685. Action by State court or authority void while appeal pending.
- § 1686. Disposition of prisoner pending appeal where writ refused.
- § 1687. Disposition of prisoner if writ issued and then discharged.
- § 1688. Disposition of prisoner if ordered discharged by lower court.
- § 1689. Mode and scope of review.

§ 1669. When writ may be suspended.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Art. 1, § 9, clause 2, United States Constitution.

It is apparently undecided what department of the government has the right of suspending the writ. It has been held that only Congress has the right to suspend,¹ but this ruling has not been followed.² The War De-

¹Ex parte Merryman, Taney, 246, ²Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 9,487; see also Ex parte Fed. Cas. No. 4,761. Bollman, 4 Cranch, 101, 2 L. ed. 563.

partment has been held to have no right to suspend the writ.³ It is held that the suspension of the privilege of the writ of habeas corpus does not suspend the writ itself, but after it issues and on return made, the court decides whether the party applying is denied the right of proceeding further.⁴

§ 1670. Supreme Court, circuit and district courts may issue writ.

The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.^{[a]-[d]}

R. S. § 751, U. S. Comp. Stat. 1901, p. 592.

[a] In general.

Habeas corpus is a high prerogative writ known to the common law, the object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment,⁷ and is a civil and not a criminal proceeding,⁸ even when instituted to arrest a criminal prosecution.⁹ The power to issue writs of habeas corpus is vested by the above section in the courts of the United States.¹⁰ The grant of jurisdiction is in language as broad as could well be employed. It is, however, attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law.¹¹ One under arrest but at large on bail is entitled to the writ the same as if the arrest was accompanied by actual imprisonment.¹²

[b] Rules of comity observed in issuance of writ.

The rules followed by the Federal courts in the matter of habeas corpus for the release of State prisoners where conflicts of jurisdiction might result from their interference are discussed in a previous section of this Code.¹⁵ Similar rules of comity prevail between different Federal courts and the power of one circuit court to review the judgment of another on habeas corpus is denied.¹⁶ These rules are important in practice, for while the right to apply for habeas corpus is absolute, the courts have found it necessary to circumscribe the cases in which applications will be enter-

³Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761.

⁴Ex parte Milligan, 4 Wall. 131, 18 L. ed. 299.

⁷Ex parte Watkins, 3 Pet. 202, 7 L. ed. 650.

⁸Cross v. Burke, 146 U. S. 82, 36 L. ed. 898, 13 Sup. Ct. Rep. 22; Farnsworth v. Montana, 129 U. S. 113, 32 L. ed. 616, 9 Sup. Ct. Rep. 253; Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148.

⁹Ex parte Tom Tong, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871.

¹⁰Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 563; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

¹¹Ex parte Royall, 117 U. S. 247, 29 L. ed. 870, 6 Sup. Ct. Rep. 734.

¹²Mackenzie v. Barrett, 141 Fed. 964; (C. C. A.) In re Grice, 79 Fed. 627; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287.

¹⁵Ante, § 18.

¹⁶In re Eaton, 51 Fed. 806; In re Hale, 139 Fed. 504; see also ante, §

tained. Where, for instances, review by error or appeal is open to a party imprisoned the general rule is that he must obtain relief by that method,¹⁸ unless there be exceptional circumstances of urgency.¹⁹ It will seldom issue as substitute for writ of error to a State court.²⁰ This subject is more fully discussed elsewhere.¹

[c] Issuance of writ by Supreme Court.

Since the Supreme Court's original jurisdiction cannot be extended by Congress to any other cases than those expressly defined by the Constitution,⁴ it has been necessary to justify the issuance of habeas corpus on original petition to that tribunal as an exercise of appellate jurisdiction,⁵ unless affecting ambassadors, other public ministers or consuls or otherwise of the class in which original jurisdiction has been granted to it.⁶ It was early decided that on an original application to the Supreme Court for the writ of habeas corpus, the court may determine the legality of the imprisonment, when such imprisonment is under the judgment of an inferior court.⁷ This rule has been uniformly followed,⁸ whether the Supreme Court has jurisdiction to review the judgment of conviction by writ of error or not.⁹ If, however, the prisoner is not confined under the judgment of an inferior court, as where he is committed on proceedings before a United States commissioner¹⁰ or before a district judge at chambers, who exercises a special authority,¹¹ the Supreme Court has no ap-

¹⁸In re Duncan, 139 U. S. 454, 455, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; In re Chapman, 156 U. S. 215, 39 L. ed. 402, 15 Sup. Ct. Rep. 331; Ex parte Frederick, 149 U. S. 77, 37 L. ed. 657, 13 Sup. Ct. Rep. 793; In re Tyler, 149 U. S. 180, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; In re Swan, 150 U. S. 648, 37 L. ed. 1209, 14 Sup. Ct. Rep. 225.

¹⁹Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; In re Loney, 134 U. S. 375, 33 L. ed. 951, 10 Sup. Ct. Rep. 584; Ex parte Frederick, 149 U. S. 75, 37 L. ed. 657, 13 Sup. Ct. Rep. 793; In re Belt, 159 U. S. 100, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; In re Chapman, 156 U. S. 218, 39 L. ed. 401, 15 Sup. Ct. Rep. 331.

²⁰Storti v. Massachusetts, 183 U. S. 142, 46 L. ed. 120, 22 Sup. Ct. Rep. 72; see Markuson v. Boncher, 175 U. S. 185, 186, 44 L. ed. 124, 20 Sup. Ct. Rep. 76.

¹Ante, § 18.

⁴Ex parte Yerger, 8 Wall. 97, 19 L. ed. 336; see also ante, § 35.

⁵Ex parte Hung Hang, 108 U. S. 553, 27 L. ed. 812, 2 Sup. Ct. Rep. 863; see also Ex parte Siebold, 100

U. S. 374, 25 L. ed. 717; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787, Ex parte Lang, 18 Wall. 163, 21 L. ed. 872; Ex parte Moran, 144 Fed. 596. (C. C. A.)

⁶Ex parte Yerger, 8 Wall. 97, 19 L. ed. 336; Ex parte Hung Hang, 108 U. S. 553, 27 L. ed. 812, 2 Sup. Ct. Rep. 863; see ante §§ 35, 36.

⁷United States v. Hamilton, 3 Dall. 17, 1 L. ed. 490; Ex parte Burford, 3 Cr. 449, 2 L. ed. 495; Ex parte Bollman, 4 Cranch, 101, 2 L. ed. 565.

⁸Ex parte Watkins, 7 Pet. 573, 8 L. ed. 788; Ex parte Milligan, 4 Wall. 110, 18 L. ed. 292; Ex parte Lange, 18 Wall. 166, 21 L. ed. 875; Ex parte Virginia, 100 U. S. 341, 25 L. ed. 678; Ex parte Siebold, 100 U. S. 374, 25 L. ed. 717; Ex parte Fisk, 113 U. S. 719, 28 L. ed. 1119, 5 Sup. Ct. Rep. 726; Ex parte Clarke, 100 U. S. 403, 25 L. ed. 716.

⁹Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

¹⁰In re Kaine, 14 How. 120, 14 L. ed. 351.

¹¹Ex parte Metzger, 5 How. 176, 12 L. ed. 104.

pellate jurisdiction, and hence cannot entertain a direct application for a writ of habeas corpus for relief from such confinement.¹²

Notwithstanding the extensive nature of the Supreme Court's power to entertain original petitions for habeas corpus it will rarely if ever issue the writ nowadays in a case over which a circuit court has jurisdiction,¹³ nor will it interfere by habeas corpus with proceedings pending in such court or in a court of the District of Columbia.¹⁴ Practical considerations compel the adoption of this attitude.

[d] — certiorari in aid of writ.

Not infrequently the writ of certiorari has been prayed and issued by the Supreme Court in aid of original applications to that tribunal for habeas corpus, especially where it is desired to bring up the record of proceedings of a lower court in connection with the proceedings.¹⁵ The lower courts have also at times used certiorari in this auxiliary way.¹⁶ It can be used by the Supreme Court in this mode, however, only as an ancillary process in aid of a jurisdiction already otherwise acquired.¹⁸

§ 1671. Power of circuit court of appeals to issue.

The twelfth section of the circuit court of appeals act¹ confers a general power to issue writs, and the power of the circuit courts of appeal to issue habeas corpus has been asserted.

Author's section.

In the fourth circuit the power of the circuit court of appeals to issue habeas corpus has been declared to be beyond question.² There would nevertheless seem to be considerable question if the statutes are to be taken literally. While the 12th section of the circuit court of appeals act³ gives that court the power to issue writs conferred by R. S. § 716⁴ upon the circuit, district and supreme courts, that section of the Revised Statutes does not include habeas corpus, but applies only to scire facias and other writs "not specifically provided for by statute." Habeas corpus is so

¹²In *re* Kaine, 14 How. 120, 14 L. ed. 351.

¹³*Ex parte* Mirzan, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341; *In re* Huntington, 137 U. S. 64, 34 L. ed. 568, 11 Sup. Ct. Rep. 4.

¹⁴*In re* Chapman, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. Rep. 331.

¹⁵*Ex parte* Buford, 3 Cranch, 449, 2 L. ed. 495; *Ex parte* Bollman, 4 Cranch 75, 2 L. ed. 554; *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281; *McCardles Case*, 6 Wall. 318, 18 L. ed. 816; *Ex parte* Lange, 18 Wall. 163, 21 L. ed. 872; *Ex parte* Jackson, 96 U. S. 727, 24 L. ed. 877, *Ex parte* Virginia, 100 U. S. 339, 25 L.

ed. 677; *Ex parte* Clarke, 100 U. S. 399, 25 L. ed. 715.

¹⁶*See In re* Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; *Ex parte* Stupp, 12 Blatchf. 50, 1 Fed. Cas. No. 13,563.

¹⁸*United States v. Young*, 94 U. S. 259, 24 L. ed. 153; *American Const. Co. v. Jacksonville Ry.* 148 U. S. 380, 37 L. ed. 490, 13 Sup. Ct. Rep. 762; *see ante*, § 841.

¹*Ante*, § 842; also § 841.[d]

²*Ex parte* Buskirk, 72 Fed. 14, 22, 18 C. C. A. 410.

³*Ante*, § 842.

⁴*Ante*, § 841.

specifically provided for by other sections which are contained in this chapter. A recent decision of the Supreme Court has decided the question so far as original jurisdiction is concerned, holding that the circuit court of appeals, having appellate jurisdiction only, cannot issue the writ as an original and independent proceeding, and that, if issuable at all, it may be allowed only in aid of jurisdiction already existing.⁵

§1672. Issue of writ by Porto Rico courts.

The Supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district and circuit courts of the United States.

Part of § 35 of act April 12, 1900, c. 191, 31 Stat. 85.

§ 1673. Power of judges to issue.

The several justices and judges of the said courts [i. e. of the Supreme, circuit and district courts], within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

R. S. § 752, U. S. Comp. Stat. 1901, p. 592.

[a] In general.

The term used in the above section, "within their respective jurisdictions," is held to have reference to territorial jurisdictions.⁷ A Supreme Court justice may, however, issue the writ in any part of the United States in which he happens to be.⁸ Application for this writ may be made to a court or judge. The general rule is that such judge may, upon return of the writ, refer it to the court;⁹ and this rule is followed in the Supreme Court, at least in cases where the issuance of the writ was an exercise of appellate jurisdiction.¹⁰

[b] Appealability of judge's decision.

Where the writ is heard by a circuit judge out of court or at chambers, no appeal lies to the Supreme Court from his decision.¹⁴ And the order

⁵Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; and see Ex parte Moran, 144 Fed. 597, (C. C. A.) holding writ issuable in aid of appellate jurisdiction.

⁷Ex parte Kenyon, 5 Dill. 385, Fed. Cas. No. 7,720.

⁸Ex parte Clarke, 100 U. S. 403, 25 L. ed. 715.

⁹Ex parte Clarke, 100 U. S. 402, 25 L. ed. 715; In re Fitton, 45 Fed. 472.

¹⁰Ex parte Clarke, 100 U. S. 403, 25 L. ed. 715; but see In re Kaine, 14 How. 103, 14 L. ed. 345, which is distinguished in Ex parte Clarke, 100 U. S. 403, 25 L. ed. 715.

¹⁴Whitten v. Tomlinson, 160 U. S. 244, 40 L. ed. 413, 16 Sup. Ct. Rep. 297; Lambert v. Barrett, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825; In re King, 51 Fed. 435.

of such judge that the papers be filed and his order recorded in the circuit court does not make his decision a decision of the court.¹⁵

§ 1674. Rules limiting issuance of writ where prisoner in jail.

The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction, of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

R. S. § 753, U. S. Comp. Stat. 1901, p. 592.

The writ may issue to inquire into the cause of commitment under civil as well as criminal process.¹⁸ One arrested and imprisoned for debt is a prisoner in jail within this section, and may have habeas corpus.¹⁹ If the restraint is contrary to the laws and Constitution of the United States it is immaterial by what authority the prisoner is confined, even though it be by the court's own sentence.²⁰ Hence it is the general rule that the Federal courts have jurisdiction under the provisions of the above section to discharge from custody a person restrained of his liberty, although he may be held under State process for trial on a charge of crime or on a conviction thereof,¹ and a State decision that the petitioner is not restrained contrary to the Federal Constitution is not binding.² The practice in such cases is discussed in a previous section of the Code.³ It is not material whether there has been a formal conviction or not, the question being solely as to the lawfulness of the restraint.⁴ But the practice of reviewing by habeas corpus the constitutionality of a State statute under which the petitioner has been convicted, is to be condemned when

¹⁵Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825.

¹⁸Ex parte Caldwell, 138 Fed. 487.

¹⁹In re Mineau, 45 Fed. 188.

²⁰In re Greathouse, 4 Sawy. 487, Fed. Cas. No. 5,741, 2 Abb. (U. S.) 382.

¹Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734;

Ex parte Fonda, 117 U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; Ex parte Yung Jon, 28 Fed. 308; United States v. Lewis, 129 Fed. 825.

²Brown v. Urquhart, 139 Fed. 848.

³See ante, § 18.

⁴In re McDonald, 9 Am. L. R. 661; see also Wildenhuss Case, 120 U. S. 11, 30 L. ed. 567, 7 Sup. Ct. Rep. 385.

all points raised upon the writ may be reviewed in the regular way on appeal.⁵ So also it is only in exceptional cases that the Federal courts will review such question on habeas corpus in advance of State trial.⁶ Where the restraint of the prisoner by State officials is in violation of the State law only, the Federal court has no jurisdiction,⁷ as where the petitioner is confined by State court for refusing to answer because it would incriminate.⁸ Under the general authority granted by this and R. S. § 761⁹ Federal courts have jurisdiction to release on habeas corpus a person confined for acts done or omitted in pursuance of the Federal laws.¹⁰ Where Federal officers are indicted for killing a prisoner they were seeking to arrest the Federal court has jurisdiction on habeas corpus to determine the lawfulness of the restraint.¹¹ A person arrested on interstate extradition proceedings is "in custody under or by color of the authority of the United States" within the meaning of this section since such proceedings are authorized by the United States Constitution;¹² and hence the court may inquire into the legality of the detention.¹³ A person committed for foreign extradition by a United States commissioner is also within the meaning of the above clause.¹⁴ Hence an officer arrested for discharging his duty in such extradition cases is in custody for an act done in pursuance of a United States law, and is entitled by this section to habeas corpus.¹⁵

The rules of comity restricting the use of the writ for the liberation of State prisoners have been discussed in the first chapter of this Code.¹⁶

§ 1675. Form of application for writ.

Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended,^[a] setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known.^[b] The facts set forth in the com-

⁵In *re* Frederick, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; In *re* Reeves, 123 Fed. 343; Brown v. Urquhart, 139 Fed. 848; In *re* Ammon, 132 Fed. 714; Ex parte Powers, 129 Fed. 985; ante, § 18.

⁶Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; In *re* Wyman, 132 Fed. 708; ante, § 18.

⁷Ex parte Brown, 140 Fed. 461; In *re* Brosnahan, 18 Fed. 62, 4 McCrary, 1; Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup Ct. Rep. 389.

⁸Ex parte Munn, 140 Fed. 782.

⁹See post, § 1682.

¹⁰In *re* Leaken, 137 Fed. 682; see also In *re* Neagle, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

¹¹In *re* Laing, 127 Fed. 213, and cases cited.

¹²United States Constitution, art 4, § 2.

¹³In *re* Doo Woon, 18 Fed. 898, 9 Sawy 417; see also Bruce v. Rayner, 124 Fed. 481, 62 C. C. A. 501.

¹⁴In *re* Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563; In *re* Kaine, 3 Blatchf. 1, Fed. Cas. No. 7,597.

¹⁵In *re* Titus, 8 Ben. 411, Fed. Cas. No. 14,062.

¹⁶Ante, § 18.

plaint shall be verified by the oath of the person making the application.^[c]

R. S. § 754, U. S. Comp. Stat. 1901, p. 593.

[a] Who may petition for prisoner's release.

While there is no provision as to who may apply for the writ, it has been held that the application need not be made by the prisoner himself, but may be granted at the request of a stranger who has no legal interest in the matter.¹ The writ has been refused, however, when applied for by friends without the authority of the prisoner.² It has been applied for by a foreign vice consul at the request of foreign resident, for the release from custody of a child held in this country. In that case, however, the court considered it questionable whether it had jurisdiction, and decided the case on other grounds.³ Where a fugitive from the justice of the laws of a State had fled to a neighboring State, and had been abducted therefrom no objection was made to a petition for habeas corpus which was signed by the governor of the State of asylum.⁴ A deputy United States marshal with a warrant for the extradition of a person arrested under State civil process has been held to have the right to apply for the writ.⁵ While it cannot be said that the United States cannot be a petitioner for a writ of habeas corpus, in a proper case, the court will not make an order permitting the United States to be substituted as a petitioner in a proceeding of which, as instituted, the court is without jurisdiction unless such action is shown to be necessary to prevent the failure of justice.⁶

[b] Application, what to contain.

The petition must show the jurisdiction of the court or judge to grant the writ.⁹ The petitioner may state facts outside of but not inconsistent with the record, showing that the court under process of which the prisoner is held, had no jurisdiction over the person or subject matter.¹⁰ In extradition cases, where the petitioner seeks to deny that an extraditable offense is charged in the complaint he must set forth such denial in his application for the writ.¹¹ Where the petition alleges invalidity of process or proceedings under which the prisoner is held, copies of such process or proceedings, or essential parts thereof, must be set out.¹² So, where the

¹In re Hoyle, 9 Am. Law. Rec. 65, Fed. Cas. No. 6,803; In re Ferrens, 3 Ben. 445, Fed. Cas. No. 4,746.

²Ex parte Dorr, 3 How. 106, 11 L. ed. 514.

³United States v. Savage, 91 Fed. 491.

⁴Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204.

⁵Ex parte Mineau, 45 Fed. 188.

⁶In re Celestine, 114 Fed. 552.

⁹Ex parte Milburn, 9 Pet. 704, 9 L. ed. 281.

¹⁰In re Mayfield, 141 U. S. 116, 35 L. ed. 638, 11 Sup. Ct. Rep. 939.

¹¹Terlinden v. Ames, 184 U. S. 278, 46 L. ed. 341, 22 Sup. Ct. Rep. 484.

¹²Craemer v. State, 168 U. S. 129, 42 L. ed. 409, 18 Sup. Ct. Rep. 1; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Kohl v. Lehlbach, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Anderson v. Treat, 172 U. S. 24, 43 L. ed. 351, 19 Sup. Ct. Rep. 67.

party is detained under a commitment, he must produce a copy thereof or an affidavit that the sheriff refused him a copy.¹³ Where the petition shows that the lower court was competent to try the offense, it must show that the judgment was a nullity,¹⁴ or that the prisoner has served the sentence.¹⁵ Mere averments of conclusions of law are not sufficient to give the court jurisdiction.¹⁶ So also in cases of foreign extradition, mere general conclusions as to the legal effect of the evidence heard before the commissioner do not state sufficient cause for the issuance of the writ.¹⁷

[c] Verification.

The application must be supported by oath, taken before one of whom judicial notice will be taken as qualified to administer oaths.²⁰

§ 1676. Allowance and direction of writ.

The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. § 755, U. S. Comp. Stat. 1901, p. 593.

The usual course on the application for the writ is to issue the same "forthwith" and on its return to hear and dispose of the case.³ Where however the cause of the imprisonment fully appears by the petition and the exhibits thereto, the court may determine whether, on the facts presented in the petition, the prisoner if brought before the court would be discharged.⁴ In the Supreme Court the practice is for the person applying for the writ to obtain and serve upon the one causing the detention, a rule to show cause why the writ should not issue;⁵ and if it be found that the prisoner is entitled to his discharge, the rule should be made absolute, and the writ or deed to issue if necessary to the prisoner's release.⁶

¹³In re Harrison, 1 Cr. C. C. 159, Fed. Cas. No. 6,131; United States v. Bollman, 1 Cr. C. C. 373, Fed. Cas. No. 14,622.

¹⁴In re Greenwald, 77 Fed. 590; see also Howard v. United States, 75 Fed. 986, 34 L.R.A. 509, 21 C. C. A. 586.

¹⁵In re Greenwald, 77 Fed. 590.

¹⁶Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L.R.A. 784; see also Ex parte Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703.

¹⁷In re Toulouse de Lautrec, 102 Fed. 878, 43 C. C. A. 42.

²⁰In re Keeler, Hemp. 306, Fed. Cas. No. 7,637.

³In re Lewis, 114 Fed. 965.

⁴Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; In re Lewis, 114 Fed. 965; see Ex parte Yarborough, 110 U. S. 653, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

⁵In re Lewis, 114 Fed. 965.

⁶See In re Burrus, 136 U. S. 586, 34 L. ed. 500, 10 Sup. Ct. Rep. 850; See also Ex parte Yarbrough, 110 U. S. 653, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

While the writ is a writ of right,⁷ it does not issue as of course, and some ground for it must be shown.⁸ Hence where the court is satisfied upon application for the writ that the prisoner would be remanded upon the return, the writ ought not to be awarded.⁹ The provision that the writ will issue unless it appears from the petition itself that the party is not entitled thereto merely declares the common law practice in this respect.¹⁰

§ 1677. Time of return.

Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance, and not beyond a distance of a hundred miles, within ten days; and if beyond a distance of a hundred miles, within twenty days.

R. S. § 756, U. S. Comp. Stat. 1901, p. 593.

The above section was carried into the Revised Statutes from an act of 1867.¹¹ Prior to this act a reasonable time was always allowed for making the return,¹² and attachment to compel return, until three days had expired after service of the writ had been refused.¹³ Where service of the writ is prevented by force, it will be placed on the files of the court for service at a subsequent time, when and where it may be practicable to make it.¹⁴

§ 1678. Return to set forth true cause of detention.

The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

R. S. § 757, U. S. Comp. Stat. 1901, p. 593.

The above section was originally enacted in 1867.¹⁵ The return must

⁷In re King, 51 Fed. 435; Ex parte Murray, 66 Fed. 298.

⁸In re King, 51 Fed. 435; In re Boardman, 169 U. S. 39, 42 L. ed. 653, 18 Sup. Ct. Rep. 291; Ex parte Murray, 66 Fed. 298; In re Keeler, Hemp. 306, Fed. Cas. No. 7,637; United States v. Lawrence, 4 Cr. C. C. 518, Fed. Cas. No. 15,577; In re Haskell, 52 Fed. 797.

⁹Ex parte Watkins, 3 Pet. 201, 7 L. ed. 650; Ex parte Milligan, 4 Wall. 110, 18 L. ed. 292; Ex parte Royall, 117 U. S. 250, 29 L. ed. 871, 6 Sup. Ct. Rep. 739; Ex parte Terry, 128 U. S. 301, 32 L. ed. 408, 9 Sup. Ct. Rep. 78; In re Burrus, 136 U. S. 601, 34 L. ed. 505, 10 Sup. Ct. Rep.

850, 42 Fed. 113; In re Boardman, 169 U. S. 43, 42 L. ed. 653, 18 Sup. Ct. Rep. 291; In re King, 51 Fed. 435; In re Eaton, 51 Fed. 804; Ex parte Murray, 66 Fed. 298; In re Hacker, 73 Fed. 467.

¹⁰In re Haskell, 52 Fed. 797.

¹¹Act Feb. 5, 1867, c. 28, § 1, 14 Stat. 385.

¹²See Ex parte Baez, 177 U. S. 389, 44 L. ed. 817, 20 Sup. Ct. Rep. 673.

¹³United States v. Bollman, 1 Cr. C. C. 373, Fed. Cas. No. 14,622.

¹⁴In re Winder, 2 Cliff. 89, Fed. Cas. No. 17,867.

¹⁵Act Feb. 3, 1867, c. 28, § 1, 14 Stat. 385.

specify the true cause of the detention of the prisoner,²⁰ and must be signed by the person to whom it is directed.¹ To justify the holding of the prisoner the return must show that the caption and detention were legal at the time of the service of the writ. Hence a return showing the caption and detention upon valid process since such service, is insufficient and the prisoner should be discharged.² A failure of the sheriff's return to set forth an indictment and warrant of extradition, in an extradition case, is not such defect as will justify the Federal courts in taking the prisoner out of the custody of the State authorities.³ The return on writ of habeas corpus imports verity and needs no evidence until impeached.⁴ A false or evasive return⁵ or a refusal to produce the body of the prisoner in court,⁶ may be punished by contempt. It is irregular to order the prisoner delivered to the custody of the petitioner before a return has been made.⁷

§ 1679. Body of party to be produced.

The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

R. S. § 758, U. S. Comp. Stat. 1901, p. 593.

The above section was originally enacted in 1867.⁹ The person making the return must produce the prisoner or must declare so far as he knows what has become of him.¹⁰ Hence a simple allegation that the prisoner is not in his custody, power or control will not discharge the person making the return if the court is of opinion that all the material facts are not disclosed.¹¹

§ 1680. Day of hearing.

When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

R. S. § 759, U. S. Comp. Stat. 1901, p. 594.

The above section was carried into the Revised Statutes from an act of 1867.¹²

²⁰In re Cuddy, 131 U. S. 283, 33 L. ed. 156, 9 Sup. Ct. Rep. 703.

¹Seavey v. Seymour, 3 Cliff. 439, Fed. Cas. No. 12,596.

²See In re Doo Woon, 18 Fed. 898, 9 Sawy. 417.

³Whitten v. Tomlinson, 160 U. S. 245, 40 L. ed. 413, 16 Sup. Ct. Rep. 297.

⁴Crowley v. Christensen, 137 U. S. 94, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

⁵United States v. Williamson, 3 Am. Law Reg. 729, Fed. Cas. No. 16,725.

⁶United States v. Davis, 5 Cr. C. C. 622, Fed. Cas. No. 14,926.

⁷In re Poole, 2 McArthur, 583.

⁹Act Feb. 5, 1867, c. 28, § 1, 14 Stat. 385.

¹⁰United States v. Williamson, 4 Am. Law Reg. 5, Fed. Cas. No. 16,726.

¹¹United States v. Green 3 Mason, 482, Fed. Cas. No. 15,256.

¹²Act Feb. 5, 1867, c. 28, § 1, 14 Stat. 385.

§ 1681. Denial of return—new facts—amendment.

The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

R. S. § 760, U. S. Comp. Stat. 1901, p. 594.

The above section was carried into the Revised Statutes from an act of 1867.¹⁵ The petitioner may deny any material fact set out in the return.¹⁶ After the traverse to the return, the new matter averred is deemed to be at issue and no further pleading is required.¹⁷ Failure to state material allegations in the return is not demurrable where such allegations are contained in the petition itself.¹⁸

§ 1682. Summary hearing and disposition of party.

The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments,^{[a]-[b]} and thereupon to dispose of the party as law and justice require.^{[c]-[d]}

R. S. § 761, U. S. Comp. Stat. 1901, p. 594.

[a] Scope of inquiry at hearing.

The sole inquiry in habeas corpus cases is as to the lawfulness of the detention of the prisoner.² But in case of imprisonment under judgment the detention cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject.³ Hence relief cannot be obtained under the writ unless the court

¹⁵Act March 5, 1867, c. 28, § 1, 14 Stat. 385.

¹⁶Seavey v. Seymour, 3 Cliff. 439, Fed. Cas. No. 12,596; see also Ex parte Kaine, 10 N. Y. Leg. Obs. 257, Fed. Cas. No. 7,598.

¹⁷In re Leary, 10 Ben. 198, Fed. Cas. No. 8,162.

¹⁸In re Ah Toy, 45 Fed. 795.

²Ex parte Watkins, 3 Pet. 197, 7 L. ed. 651; Grignon v. Astor, 2 How. 339, 11 L. ed. 291; In re Metzger, 5 How. 190, 12 L. ed. 110; In re Delago, 140 U. S. 586, 37 L. ed. 578, 11 Sup. Ct. Rep. 874; In re Frederick, 149

U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; In re Belt, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; In re Marsh, 51 Fed. 277; In re Davison, 22 Blatchf. 476, 21 Fed. 621; In re Li Sing, 86 Fed. 897, 30 C. C. A. 451; In re Bryant, 80 Fed. 282; Ex parte Moran, 144 Fed. 594, (C. C. A.)
³Ex parte Watkins 3 Pet. 203, 7 L. ed. 650; In re Wilson, 140 U. S. 583, 35 L. ed. 516, 11 Sup. Ct. Rep. 873; In re Chapman, 156 U. S. 215, 39 L. ed. 402, 15 Sup. Ct. Rep. 332; In re Bogart, 2 Sawy. 401, Fed. Cas. No. 1,596; Ex parte Ulrich, 43 Fed. 663.

under whose warrant the petitioner is held is without jurisdiction.⁴ The court may inquire into the legality of the confinement whether the party is imprisoned for contempt,⁵ or is under military ⁶ or naval court-martial,⁷ or is committed by an officer for interference with the discharge of his official duties.⁸ In all cases the question of the identity of the prisoner with the person named in the warrant is open.⁹ The circuit courts have no jurisdiction as *parens patriæ* to determine on habeas corpus, the custody of an insane person where the question of such custody is one of discretion as to the place and character of confinement.¹⁰ Where the prisoner is committed by commissioner in an extradition case the court may on habeas corpus determine the competency of the evidence but not its sufficiency.¹¹ Disputed questions of fact cannot be reviewed.¹²

[b] — custody of prisoner.

A writ of habeas corpus supersedes all other writs under which the commitment was made. The custody of the prisoner from then on is entirely under the control of the court issuing the writ or to which the return is made.¹⁶ When brought from the custody of a State officer upon a writ of habeas corpus *ad testificandum*, he will be remanded to such State officer's custody.¹⁷ While in custody under the writ the prisoner cannot be arrested on a second warrant.¹⁸

[c] Disposition of prisoner.

Since the above section provides for a summary hearing, and a disposi-

⁴Ex parte Watkins, 3 Pet. 197, 7 L. ed. 651; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Ex parte Yarborough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; Ex parte Coy, 127 U. S. 756, 32 L. ed. 280, 8 Sup. Ct. Rep. 1263; In re Schneider, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; In re Chapman, 156 U. S. 215, 39 L. ed. 402, 15 Sup. Ct. Rep. 331; Ex parte Buskirk, 72 Fed. 21, 18 C. C. A. 410. See also Mackey v. Miller, 126 Fed. 163, 62 C. C. A. 139.

⁵Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861; Ex parte Fisk, 113 U. S. 718, 28 L. ed. 1119, 5 Sup. Ct. Rep. 724; Ex parte Irvine, 74 Fed. 954.

⁶Ex parte Yerger, 8 Wall. 85, 19 L. ed. 332; Johnson v. Sayre, 158 U. S. 109, 39 L. ed. 915, 15 Sup. Ct. Rep. 773; In re Crain, 84 Fed. 788; Meade

v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372.

⁷See Wales v. Whitney, 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050.

⁸Ex parte Geissler, 4 Fed. 188.

⁹In re Leary, 10 Ben. 198, Fed. Cas. No. 8,162.

¹⁰King v. McLean Asylum, 64 Fed. 333, 26 L.R.A. 784, 12 C. C. A. 145.

¹¹Ex parte Van Aernam, 3 Blatchf. 160, Fed. Cas. No. 16,824; In re MacDonnell, 11 Blatchf. 79, Fed. Cas. No. 8,771; In re Wahl, 15 Blatchf. 334, Fed. Cas. No. 17,041; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563. See also, ante § 1642.^[h]

¹²In re Strauss, 126 Fed. 327, 63 C. C. A. 99.

¹⁶In re Kaine, per Nelson, J., 14 How. 146, 14 L. ed. 345; Barth v. Clise, 12 Wall. 402, 20 L. ed. 394.

¹⁷In re Hamilton, 1 Ben. 455, Fed. Cas. No. 5,976.

¹⁸In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

tion of the party as law and justice require,² all the freedom of equity procedure is thus prescribed³ and this is true whether the court is exercising its original or appellate jurisdiction, substantial justice promptly administered being the rule followed in all such cases.⁴ Hence the court is invested with the largest power to direct and control the form of judgment to be entered.⁵ Thus, where substantial justice requires it, the discharge of the prisoner may be delayed for a reasonable time.⁶ And notification of the date of the discharge may be given to the proper authorities so that the prisoner may be held for a subsequent trial.⁷ So also where a soldier has been court-martialed and sentenced and has been tried by civil authorities on his escape from the military prison, although he is entitled to habeas corpus, the civil authorities having no jurisdiction, he may be remanded to a military prison by the court.⁸ Likewise a prisoner has been discharged on an irregular commitment and then committed by the court de novo, where the evidence was sufficient.⁹ Upon the same principles of equitable procedure, a discharge will not be granted for defects in the original arrest and commitment, if sufficient grounds for the prisoner's detention be shown.¹⁰ Where part of the punishment imposed by the lower court was within the jurisdiction of that court, the prisoner cannot be discharged on habeas corpus, until he has served so much of the sentence or performed so much of the judgment as was in the power of the lower court to impose.¹¹

[d] Effect of discharge.

A discharge upon habeas corpus does not protect the party from arrest under other process for the same offense.¹⁴ Nor, on the other hand, does a decision adverse to the petitioner rendered by a court or judge bar successive applications for discharge.¹⁵

§ 1683. Notice to State's attorney when State prisoner claims exemption under international law.

When a writ of habeas corpus is issued in the case of any prisoner who, being a subject or citizen of a foreign State and domiciled therein, is committed, or confined, or in custody, by or under the

²Neagle, *In re* 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

³Storti v. Massachusetts, 183 U. S. 143, 46 L. ed. 124, 22 Sup. Ct. Rep. 72.

⁴Idem.

⁵In re Bonner, 151 U. S. 261, 38 L. ed. 153, 14 Sup. Ct. Rep. 323.

⁶In re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384. See also, *In re Bonner*, 151 U. S. 261, 38 L. ed. 153, 14 Sup. Ct. Rep. 323.

⁷In re Medley, 134 U. S. 174, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

⁸Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118.

⁹Ex parte Bennett, 2 Cr. C. C. 612, Fed. Cas. No. 1,311.

¹⁰Iasigi v. Van De Carr, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 595; Nishimura Ekin, v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

¹¹Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; In re Swan, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 225.

¹⁴Ex parte Milburn, 9 Pet. 710, 9 L. ed. 280; In re White, 45 Fed. 239.

¹⁵Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7,597.

authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceedings to be prescribed by the court, or justice, or judge at the time of granting said writ, shall be served on the Attorney General or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court, or justice, or judge before the hearing.

R. S. § 762, U. S. Comp. Stat. 1901, ~~p.~~ 594.

The above section was carried forward into the Revised Statutes from an act of 1842.¹⁹

§ 1684. To what courts appeals taken.

Prior to the circuit court of appeals act of 1891 the jurisdiction on appeal in habeas corpus cases was regulated by R. S. §§ 763, 764, 765. The act of 1891 repealed all existing laws respecting appeal from the circuit and district courts,² and since then there have been no special provisions declaring what habeas corpus proceedings are appealable and to what court the appeal will lie, except in the case of habeas corpus applications in capital cases in the district courts of the organized Territories.³ Whether an appeal on habeas corpus proceedings in the circuit or district court should be to the Supreme Court or to the circuit court of appeals depends upon whether the case falls within the fifth or sixth section of the act of 1891.^{[a]-[b]}⁴

Author's section.

[a] Former legislation respecting habeas corpus appeals.

By R. S. § 763, it was provided that "from the final decision of any court, justice or judge inferior to the circuit court, upon an application for a writ of habeas corpus, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined or in custody, by or under the authority or law of the United States, or of any State,

¹⁹Act Aug. 29, 1842, c. 257, 5 Stat. 539.

³See ante, § 48.

⁴See ante, §§ 42. 77.

²See ante, § 37.

or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection or exemption, set up or claimed under the commission, order or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By R. S. § 764 as amended 1885⁶ it was further provided that "from the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section."

And by R. S. § 765 it was provided that "the appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings as may be prescribed by the supreme court, or in default thereof, by the court or judge hearing the cause."

[b] — superseded by act of 1891.

As stated in the text the circuit court of appeals act of 1891⁸ superseded R. S. §§ 763-765, above quoted, and effected a redistribution of the Federal appellate jurisdiction.⁹ If the validity of a Federal statute or construction of a treaty,¹⁰ or the jurisdiction of the court,¹¹ is drawn in question or other ground exists¹² upon which appeal is permitted directly from the district or circuit court to the Supreme Court,¹³ a habeas corpus appeal is to the Supreme Court. In other cases it is to the circuit court of appeals.¹⁴

⁶Act Mar. 3, 1885, c. 353, 23 Stat. 437.

⁸Act Mar. 3, 1891, c. 517, §§ 4, 5, 6, 14, 26 Stat. 828, 829, U. S. Comp. Stat. 1901, p. 549 et seq.

⁹McLish v. Roff, 141 U. S. 666, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Lau Ow Bew v. United States 144 U. S. 56, 36 L. ed. 343, 12 Sup. Ct. Rep. 519; Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. Rep. 123, 37 L. ed. 1120; Clarke v. McDade, 165 U. S. 168, 170, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72; United States v. Fowkes, 53 Fed. 13, 14, 3 C. C. A. 394. The fact that Congress amended R. S. § 766 (post § 1685) in 1893 did not indicate that

Congress intended R. S. §§ 763-765 to continue in force as governing habeas corpus appeals. Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. Rep. 123, 37 L. ed. 1120.

¹⁰Davis v. Burke 97 Fed. 501, 38 C. C. A. 299; Rice v. Ames, 180 U. S. 374, 45 L. ed. 581, 21 Sup. Ct. Rep. 406; Johnson v. Sayre, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773.

¹¹Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72.

¹²McKane v. Durston, 153 U. S. 685, 38 L. ed. 867, 14 Sup. Ct. Rep. 913.

¹³See ante, § 42.

¹⁴United States v. Fowkes, 53 Fed. 13, 3 C. C. A. 394; Webb v. York, 74 Fed. 753, 21 C. C. A. 65; King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L.R.A. 784.

§ 1685. Action by State court or authority void while appeal pending.

Pending the proceedings or appeal in the cases mentioned in the three preceding sections,¹⁶ and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, or for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void.^[b]

Provided, that no such appeal shall be had or allowed after six months from the date of the judgment or order complained of.^[a]

R. S. § 766, as amended 1893, act March 3, 1893, c. 226, 27 Stat. 751,
U. S. Comp. Stat. 1901, p. 597.

[a] The amendment of 1893.

The amendment of 1893 consisted in the addition of the concluding proviso. The fact that Congress amended the section in 1893, two years after the implied repeal of the three preceding sections to which this one refers, did not evince an intention on the part of Congress to leave those three section in force, so far as determining the court to which habeas corpus appeals would lie.¹⁸ The amendment of 1893 can be made operative by making the proviso as to time for taking appeals apply to all such appeals referred to in the three preceding sections as are still, under the act of 1891, taken to the Supreme Court direct.²⁰

[b] State action stayed.

No express order staying proceedings under State authority is here required since the mere pendency of the appeal has that effect.¹ The object of the statute is to prevent the State court, pending proceedings on appeal, from changing the situation as it was at the time of the appeal.² But there is nothing authorizing a change in the custody of the prisoner pending the stay in the proceedings.³ The jurisdiction of the State court is however restrained only pending the proceedings in the Federal courts and until final judgment therein.⁴ Hence after final judgment is entered

¹⁶See ante, § 1684[a] where the three sections are set forth.

¹⁸Ex parte Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

²⁰Ex parte Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

¹Lambert v. Barrett, 159 U. S. 662, 40 L. ed. 297, 16 Sup. Ct. Rep. 135.

²McKane v. Durston, 153 U. S. 689, 38 L. ed. 689, 14 Sup. Ct. Rep. 913.

³Idem.

⁴In re Jugiuro, 140 U. S. 295, 35 L. ed. 510, 11 Sup. Ct. Rep. 770; In re Boardman, 169 U. S. 44, 42 L. ed. 654, 18 Sup. Ct. Rep. 293; In re Durrant, 84 Fed. 319.

the State courts may immediately proceed without waiting for the mandate of the appellate court to be sent down to the lower court.⁵

§ 1686. Disposition of prisoner pending appeal where writ refused.

Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

Clause 1 of Supreme Court rule 34, as amended May 10, 1886, and of rule 33 of circuit courts of appeal.

The rule was promulgated by the Supreme Court March 29, 1886,⁸ pursuant to R. S. § 765.⁹ It was also among the rules promulgated by the Supreme Court for the several circuit courts of appeals in 1891.¹⁰ While the rule speaks of appeal from a decision of a judge, no appeal lies except from a decision of a court notwithstanding this phraseology.¹¹

§ 1687. Disposition of prisoner if writ issued and then discharged.

Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

Clause 2 of Supreme Court rule 34, as amended May 10, 1886, and of rule 33 of circuit courts of appeal.

Rule 34 was first promulgated March 29, 1886,¹⁴ pursuant to R. S. § 765.¹⁵ The 33rd rule of the several circuit courts of appeal is precisely the same.¹⁶

§ 1688. Disposition of prisoner if ordered discharged by lower court.

Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appel-

⁵In *re Boardman*, 169 U. S. 44, 42 L. ed. 654, 18 Sup. Ct. Rep. 293; In *re Jugiro*, 140 U. S. 295, 35 L. ed. 110, 11 Sup. Ct. Rep. 770. See also *Lambert v. Barrett*, 159 U. S. 662, 40 L. ed. 297, 16 Sup. Ct. Rep. 136.

⁸117 U. S. 708.

⁹Quoted ante, § 1684.[a]

¹⁰See 90 Fed. clxx.

¹¹*Carper v. Fitzgerald*, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825. See post, § 1689.[b]

¹⁴117 U. S. 708.

¹⁵Quoted ante, § 1684.[a]

¹⁶See 90 Fed. clxx note change in number of rule in seventh circuit, 90 Fed. cxx.

late court, except where, for special reasons, sureties ought not to be required.

Clause 3 of Supreme Court rule 34, as amended May 10, 1886, and of rule 33 circuit courts of appeal.¹⁷ Rule 34 was first promulgated March 29, 1886, pursuant to R. S. § 765.¹⁸ The 33rd rule of the general circuit courts of appeals is precisely the same.¹⁹ The above rule does not make the decision of the circuit judge a decision of the court.²⁰

§ 1689. Mode and scope of review.

Habeas corpus is a civil proceeding having many of the characteristics of an equitable remedy and the proper mode of procuring review is by appeal and not writ of error.^[a] Only the final order of the lower court upon the application is appealable.^[b] Appeal must be sought within six months from such final order.⁴ The writ cannot be made a substitute for writ of error so as to obtain review of errors or irregularities at a trial, and the only inquiry on appeal is whether the proceedings under which the petitioner is in custody were had by a court or officer having proper jurisdiction over person and subject matter.^[c]

Author's section.

[a] Appeal the proper mode of review.

Habeas corpus is a civil process,⁶ and the proper mode of obtaining review of habeas corpus proceedings is by appeal and not writ of error.⁷ No bill of exceptions is necessary.⁸

[b] Only final order of court appealable.

The order of the circuit or district court denying or dismissing a writ of habeas corpus¹⁰ or discharging a prisoner thereunder¹¹ is final and ap-

¹⁷117 U. S. 708.

¹⁸Quoted ante, § 1684.^[a]

¹⁹See 90 Fed. CLXX.

²⁰Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 883, 7 Sup. Ct. Rep. 825.

⁴See ante, § 1685, also post, § 1905, which specifically so provides in case of appeal to the circuit court of appeals.

⁶Farnsworth v. Montana, 129 U. S. 113, 32 L. ed. 616, 9 Sup. Ct. Rep. 253; Cross v. Burke, 146 U. S. 88, 36 L. ed. 896, 13 Sup. Ct. Rep. 22; In re Frederick, 149 U. S. 75-77, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; In re Lennon, 150 U. S. 397, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

⁷Rice v. Ames, 180 U. S. 374, 45 L. ed. 581, 21 Sup. Ct. Rep. 406. In many cases counsel have by way of caution taken an appeal and sued out writ of error as well, e. g., see Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734.

⁸Solomon v. Davenport, 87 Fed. 318, 30 C. C. A. 664.

¹⁰Holmes v. Jenison, 14 Pet. 562, 10 L. ed. 579; In re Palliser, 136 U. S. 262, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; Ex parte Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556.

¹¹In re Neagle, 135 U. S. 42, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Harkrader v. Wadley, 172 U. S. 162,

pealable, even though the preliminary application for the writ may have been before the judge of the court at chambers.¹² But the habeas corpus decision of a judge at chambers is not a final judgment of a court, and hence no appeal lies therefrom.¹³ By a parity of reasoning writ of error will not lie to review a decision of a State court judge at chambers.¹⁴ Rule 34 of the Supreme Court¹⁵ does not make the judges' decision at chambers a decision appealable although the language used would seem to so imply.¹⁶ Where the denial of the writ is by a judge at chambers he may properly refuse to allow an appeal.¹⁷ It has been held that the circuit court may in its discretion refuse to allow an appeal.¹⁸ But this has been denied.¹⁹

[c] Scope of review.

It is a well established rule that habeas corpus cannot be made to perform the functions of a writ of error.² In other words a party, cannot after trial below, obtain a review of mere errors of law³ and irregularities not jurisdictional in character,⁴ by suing out habeas corpus and then taking an appeal thereon. The temptation to strive after review by the Supreme Court in that mode, in cases where no right to writ of error exists, is obvious, but if the court below had jurisdiction of subject matter and person, habeas corpus cannot afford relief.⁵ The inquiry is as to the jur-

43 L. ed. 399, 404, 19 Sup. Ct. Rep. 119.

¹²Harkrader v. Wadley, 172 U. S. 161, 162, 43 L. ed. 404, 19 Sup. Ct. Rep. 119.

¹³Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825; Lambert v. Barrett, 157 U. S. 700, 39 L. ed. 866, 15 Sup. Ct. Rep. 723; Whitter v. Tomlinson, 160 U. S. 244, 40 L. ed. 413, 16 Sup. Ct. Rep. 302; Ex parte Jacobi, 104 Fed. 681.

¹⁴McKnight v. James, 155 U. S. 687, 39 L. ed. 311, 15 Sup. Ct. Rep. 249.

¹⁵See ante, § 1686.

¹⁶Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882, 7 Sup. Ct. Rep. 825.

¹⁷In re King, 51 Fed. 440.

¹⁸In re Durrant, 84 Fed. 317. See In re Boardman, 169 U. S. 43, 42 L. ed. 653, 18 Sup. Ct. Rep. 291.

¹⁹In re Marmo, 138 Fed. 201.

²Whitney v. Dick, 202 U. S. 136, 50 L. ed. 964, 26 Sup. Ct. Rep. 584; Andersen v. Treat, 172 U. S. 24, 43 L. ed. 353, 19 Sup. Ct. Rep. 67; Ex parte Tyler, 149 U. S. 180, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; Ex parte

Frederick, 149 U. S. 75, 37 L. ed. 656, 13 Sup. Ct. Rep. 793; In re Swan, 150 U. S. 648, 37 L. ed. 1209, 14 Sup. Ct. Rep. 225; Ex parte Siebold, 100 U. S. 375, 25 L. ed. 717; Stevens v. Fuller, 136 U. S. 478, 34 L. ed. 463, 10 Sup. Ct. Rep. 913; In re Morris, 40 Fed. 825; In re Jordan, 49 Fed. 244; Ex parte Ulrich, 43 Fed. 663; In re Callicot, 8 Blatchf. 89, Fed. Cas. No. 2,323; Ex parte Shaffenburg, 4 Dill. 271, Fed. Cas. No. 12,696.

³In re Terrill, 144 Fed. 616, (C. C. A.); Ex parte Parks, 93 U. S. 21, 23 L. ed. 787; Ex parte Yarrow, 110 U. S. 654, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; In re Wood, 140 U. S. 290, 35 L. ed. 505, 11 Sup. Ct. Rep. 942.

⁴In re Shibuya Jugiro, 140 U. S. 296, 35 L. ed. 510, 11 Sup. Ct. Rep. 770; Felts v. Murphy, 201 U. S. 23, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Valentine v. Murphy, 201 U. S. 131, 50 L. ed. —, 26 Sup. Ct. Rep. 368.

⁵In re Lane, 135 U. S. 446, 34 L. ed. 219, 10 Sup. Ct. Rep. 760; In re Tyler, 149 U. S. 180, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Tinsley v. Anderson, 171 U. S. 106, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Ex parte Ward, 173 U. S. 454, 43 L. ed. 765, 19 Sup.

isdiction of the court below and the writ is proper to review proceedings which are void and not merely erroneous.⁶ Questions of fact and of law which a court has jurisdiction to decide cannot be reviewed;⁷ nor mere irregularities.⁸ But if the proceedings are lacking in the regular presentment or indictment required by law,⁹ or the court had no jurisdiction to imprison for contempt because the order contemned was beyond its power,¹⁰ or the imprisonment is otherwise pursuant to an order beyond the court's jurisdiction,¹¹ or pursuant to proceedings under an invalid law,¹² or otherwise contrary to the Constitution,¹³ all these and like matters may be inquired into on appeal in habeas corpus cases, and made the grounds of a petitioners discharge. The court may even go outside the record below, in its inquiry into a jurisdictional question.¹⁴ Where the petitioner seeks relief from commitment by a magistrate, the inquiry is as to such magistrate's jurisdiction and the existence of legal ground for the commitment.¹⁵

Ct. Rep. 459; *In re Wright*, 134 U. S. 142, 33 L. ed. 865, 10 Sup. Ct. Rep. 487.

⁶*Ex parte Parks*, 93 U. S. 21, 23 L. ed. 787; *Ex parte Virginia*, 100 U. S. 343, 25 L. ed. 676; *Ex parte Siebold*, 100 U. S. 375, 25 L. ed. 717; *Ex parte Fisk*, 113 U. S. 726, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Ex parte Wilson*, 114 U. S. 422, 29 L. ed. 89, 5 Sup. Ct. Rep. 935.

⁷*Ex parte Bigelow*, 113 U. S. 331, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Horner v. United States*, 143 U. S. 215, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *In re Eckart*, 166 U. S. 482, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638.

⁸*Ex parte Clarke*, 100 U. S. 403, 25 L. ed. 715; *Ex parte Wilson*, 114 U. S. 421, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Stevens v. Fuller*, 136 U. S. 477, 34 L. ed. 461, 10 Sup. Ct. Rep. 911.

⁹*Ex parte Wilson*, 114 U. S. 422, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Ex parte Bain*, 121 U. S. 13, 30 L. ed. 849, 7 Sup. Ct. Rep. 781.

¹⁰*Ex parte Fisk*, 113 U. S. 726, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *In re Ayers*, 123 U. S. 485, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte Terry*, 128 U. S. 305, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

¹¹*Ex parte Terry*, 128 U. S. 304, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *In re Swan*, 150 U. S. 648, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225.

¹²*Hans Neilson, Petitioner*, 131 U. S. 182, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Yick Wo v. Hopkins*, 118 U. S. 374, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *In re Shibuya Jugiro*, 140 U. S. 294, 35 L. ed. 510, 11 Sup. Ct. Rep. 770.

¹³*McKane v. Durston*, 153 U. S. 689, 38 L. ed. 867, 14 Sup. Ct. Rep. 913.

¹⁴*In re Mayfield*, 141 U. S. 116, 35 L. ed. 635, 11 Sup. Ct. Rep. 939.

¹⁵*Benson v. McMahon*, 127 U. S. 402, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

CHAPTER 52.

GRAND AND PETIT JURIES IN CIVIL AND CRIMINAL CASES.

- § 1699. All crimes except impeachment triable by jury.
- § 1700. Right of trial by jury.
- § 1701. Qualification, designation and exemption of jurors.
- § 1702. Employees of arsenals and armories exempt from jury duty.
- § 1703. How jurors drawn.
- § 1704. No citizen disqualified on account of race, color, etc.
- § 1705. —penalty for excluding such person from jury.
- § 1706. Venire, how issued and served.
- § 1707. Talesmen for petit juries.
- § 1708. How special juries returned.
- § 1709. Number of grand jurors—how panel completed.
- § 1710. —appointment of foreman.
- § 1711. —when summoned.
- § 1712. —discharge.
- § 1713. How often persons to be summoned as grand jurors.
- § 1714. —how often summoned as petit jurors.
- § 1715. Peremptory challenges.
- § 1716. —excess peremptory challenges to be disallowed by court.
- § 1717. Challenges in summary trials.
- § 1718. Special causes of challenge in bigamy cases, etc.
- § 1719. Disqualification of jurors in civil rights cases.
- § 1720. District grand juries may act in circuit cases.
- § 1721. Juries of circuit and district courts interchangeable.
- § 1722. Special provisions regarding service of same jurors in both circuit and district courts.
- § 1723. From what parts of district jurors returned.
- § 1724. Provisions as to residence of jurors in districts containing judicial divisions.
- § 1725. Special provisions as to summoning jurors in particular districts and divisions.

§ 1699. All crimes except impeachment triable by jury.

The trial of all crimes, except in cases of impeachment, shall be by jury.

Part of clause 3, § 2, Article III., U. S. Constitution.

The balance of this clause provides the place of trial.¹⁴ It does not apply to State courts.¹⁵ This guaranty has been held to apply to a state of war as well as of peace and limit the power of Congress.¹⁶ It applies to the so called organized Territories¹⁷ though not necessarily to territory to which Congress has not extended the Constitution.¹⁸ It means the common law jury of twelve.¹⁹

§ 1700. Right of trial by jury.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Part of art. 6, Amendment to United States Constitution.

This provision applies to the Federal courts only,¹ and is not a restriction upon State governments in reference to their own citizens.² R. S. § 802,³ does not conflict with this provision.⁴ A provision that on trials for misdemeanors six persons shall constitute a legal jury has been held a violation of the fifth amendment and the above section.⁵

§ 1701. Qualification, designation and exemption of jurors.

Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned;^[a] and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts, may, by rule or order, conform the designation and impaneling of ju-

¹⁴Ante, § 426.

¹⁵Nashville, etc. Ry. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. Rep. 28.

¹⁶Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

¹⁷Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42 L. ed. 1061.

¹⁸Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. ed. 1016.

¹⁹Thomson v. Utah, supra.

¹Fox v. Ohio, 5 How. 434, 12 L. ed. 213; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Ex parte Brown, 140 Fed. 461.

²Twitchell v. Commonwealth, 7 Wall. 325, 19 L. ed. 224.

³Post, § 1722.

⁴United States v. Ayres, 46 Fed. 651.

⁵Gius v. United States, 141 Fed. 956, C. C. A.

ries, in substance, to the laws and usages relating to jurors in the State courts, from time to time in force in such State. . . .^[c]

Part of R. S. § 800, U. S. Comp. Stat. 1901, p. 623.

[a] State law controls as to qualification and exemptions.

The omitted portion of the above section was repealed by an act of 1879.⁸ It provided that the section should not apply to juries for the courts of the United States in Pennsylvania. A provision of an act of 1879 inaugurated a new system of drawing the names of jurors.⁹ It is well established that the State law controls as to the qualifications and exemptions of jurors to serve in the Federal courts.¹⁰ But substantial conformity to such laws is all that is required,¹¹ and the court is not required to comply with the State laws and practice where it is wholly impracticable to do so.¹² Hence in considering objections to such laws is all that is required.¹¹ Hence in considering objections to grand jurors, the Federal courts are not restricted to such as are specifically designated by State laws, but may give effect to any objection which goes to the fitness of the men to serve.¹³ And they may enforce such objections on their own motion or that of counsel.¹⁴ The practice is to examine each juror upon his oath as he is called regarding his statutory qualifications and to accept him if his answers are satisfactory.¹⁵ It is said that the qualifications referred to in this section are the general qualifications as to age, citizenship, etc.,¹⁶ and hence some fact which would disqualify a juror from acting in the particular case, under the State law, would not disqualify him from acting in a federal case.¹⁷ Thus it is held that a prosecuting witness may serve as juror although the State law disqualifies him from acting in that capacity.¹⁸ The court has the undoubted power for good cause shown, to discharge a grand juror, and the effect of the absence of such juror on subsequent proceedings does not admit of inquiry.¹⁹

⁸Act June 30, 1879, c. 32, § 2, 21 Stat. 43.

⁹See *United States v. King*, 147 U. S. 678, 37 L. ed. 329, 13 Sup. Ct. Rep. 439.

¹⁰*Pointer v. United States*, 151 U. S. 407, 38 L. ed. 208, 14 Sup. Ct. Rep. 410; *St. Clair v. United States*, 154 U. S. 147, 38 L. ed. 941, 14 Sup. Ct. Rep. 1007; *United States v. Wilson*, 6 McLean, 606, Fed. Cas. No. 16,737; *United States v. Collins*, 1 Woods, 499, Fed. Case No. 14,837. See *Silsby v. Foote*, 14 How. 220, 14 L. ed. 394; *Southern Pac. R. R. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416.

¹¹*United States v. Tallman*, 10 Blatchf. 21, Fed. Cas. No. 16,429.

¹²*United States v. Price*, 30 Fed. Cas. No. 16,088, 3 Hall, Law J. 121.

¹³*United States v. Benson*, 31 Fed. 896, 12 Sawy. 477.

¹⁴*United States v. Jones*, 69 Fed. 973.

¹⁵*Brewer v. Jacobs*, 22 Fed. 217.

¹⁶See *United States v. Collins*, 1 Woods, 499, Fed. Cas. No. 14,837.

¹⁷*United States v. Williams*, 1 Dill. 485, Fed. Cas. No. 16,716. But see *contra*, *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134.

¹⁸*United States v. Williams*, 1 Dill. 485, Fed. Cas. No. 16,716.

¹⁹*United States v. Mitchell*, 136 Fed. 904; *United States v. Belvin*, 46 Fed. 383.

[b] Courts by rule may conform the impaneling and designation of juries to State law.

Congress has not made the State laws relating to the designation and impaneling of juries applicable to the Federal courts except where the latter courts by general standing rule or special order adopt the State practice.² Hence in the absence of such rule or order the mode of designating and impaneling jurors is within the control of the courts subject to the restriction of Congress.³ Therefore a change of practice of State courts in the mode of summoning juries, although based upon statute, is not binding in Federal courts until adopted by rule or otherwise.⁴ The courts have large discretion as to the extent to which they will follow the State practice in regard to the designation and impaneling of juries.⁵ Where the method of selecting and impaneling in a higher State court is not practicable in a Federal court the latter may adopt the methods practiced in the lower State courts.⁶

§ 1702. Employees of arsenals and armories exempt from jury duty.

All artificers and workmen employed in the armories and arsenals of the United States shall be exempted, during their time of service, from service as jurors in any court.

R. S. § 1671, U. S. Comp. Stat. 1901, p. 1141.

§ 1703. How jurors drawn.

All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party

²St. Clair v. United States, 154 U. S. 147, 38 L. ed. 942, 14 Sup. Ct. Rep. 1008; Pointer v. United States, 151 U. S. 407, 38 L. ed. 213, 14 Sup. Ct. Rep. 410; United States v. Shackelford, 18 How. 588, 15 L. ed. 495.

³Pointer v. United States, 151 U. S. 407, 38 L. ed. 213, 14 Sup. Ct. Rep. 410.

⁴Alston v. Manning, Chase's Dec. 460, Fed. Cas. No. 266.

⁵Silby v. Foote, 14 How. 218, 14 L. ed. 394; United States v. Richardson, 28 Fed. 69; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

⁶United States v. Wilson, 6 McLean, 604, Fed. Cas. No. 16,737

affiliations, until the whole number required shall be placed therein.^[a] But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State.^[b]

Part of § 2, c. 52, act June 30, 1879, 21 Stat. 43, U. S. Comp. Stat. 1901, p. 624.

[a] Substantial compliance with statute all that is necessary.

The first part of the above section is omitted. It relates to the per diem fee of jurors,¹⁰ and repeals part of R. S. § 800, the unrepealed portion of which is given in a previous section of this Code.¹¹ It also expressly repeals R. S. §§ 801, 820 and 821. The last two clauses of the section are given in following Code sections.¹² Prior to the above enactment the drawing of jurors was regulated under R. S. § 800.¹³ The provision that the court appoint a jury commissioner who shall be a citizen of good standing and shall reside in the district in which the court is held, and who shall be a well known member of the principal political party in the district opposing that to which the clerk belongs, is merely directory and not mandatory.¹⁴ But the requirement that the jurors shall be publicly drawn from a box containing at the time of the drawing the names of not less than three hundred persons, is mandatory and any substantial departure from such requirement will invalidate subsequent proceedings if objection is seasonably made.¹⁵ A substantial compliance and an honest intention to conform to the statute is however all that is necessary.¹⁶ Thus, in a case where the circuit and district court jurors are used interchangeably¹⁷ and where the number of names in both exceeds three hundred, an indictment will not be quashed because the jurors were drawn from one of the boxes which contained at the time of the drawing less than three hundred names, all of the names in both boxes being regarded as the jury body from which the grand jury was selected.¹⁸ Likewise where the names of the jurors were placed in the boxes in handfuls, instead of alternately by the clerk and the commissioner, it was held that the indictment could not for that reason be quashed.¹⁹ Where the particular district is divided into three divisions by statute, it is not contrary to the above act, to have three jury boxes one for each place²⁰ in which the court is held. Failure of the accused to except to the overruling

¹⁰See ante, § 733.

¹¹Ante, § 1701.

¹²See post, §§ 1704, 1714.

¹³United States v. King, 147 U. S. 678, 37 L. ed. 329, 13 Sup. Ct. Rep. 439. Ante, § 1701.

¹⁴United States v. Chaires, 40 Fed. 822.

¹⁵United States v. Green, 108 Fed. 816.

¹⁶United States v. Rondeau, 16 Fed. 109, 4 Woods, 185; United States v. Ambrose, 3 Fed. 233.

¹⁷See post, § 1721.

¹⁸United States v. Green, 113 Fed. 683.

¹⁹United States v. Green, 113 Fed. 683.

²⁰United States v. Munford, 16 Fed. 165.

of his motion in arrest of judgment is a waiver of his contention that there was error in the impanelling of the jury.²⁰

[b] Two methods of drawing jurors provided.

The above section provides two methods of drawing jurors for the Federal courts; one by drawing from a box containing names put in by the clerk and a commissioner, the other by drawing from boxes used by State authorities.⁴ If the latter method is adopted a district judge may order the names of circuit court jurors to be so drawn, since by the act "any judge" may make such order.⁵ Under a territorial statute providing that names first drawn from a jury box shall constitute the grand jury, a grand jury from which jurors whose names were first called, were improperly excused, is illegal.⁶

§ 1704. No citizen disqualified on account of race, color, etc.

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.

Last clause of § 2, c. 52, of act June 30, 1879, 21 Stat. 43, U. S. Comp. Stat. 1901, p. 624.

An earlier provision identical with the above except that it purported to apply also to State courts, was contained in the Civil Rights act of 1875.⁹ While the defendant has the right that in the selection of the jury there shall be no exclusion of his race and no discrimination because of color,¹⁰ he cannot claim as a matter of right that his race shall be represented on the jury.¹¹

§ 1705. — penalty for excluding such person from jury.

Any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid¹⁴ shall, on conviction thereof,

²⁰Rodriguez v. United States, 198 U. S. 156, 49 L. ed. 994, 25 Sup. Ct. Rep. 617.

⁴United States v. Richardson, 28 Fed. 73.

⁵United States v. Hanson, 28 Fed. 74; United States v. Richardson, 28 Fed. 73.

⁶Sharp v. United States, 138 Fed. 878, (C. C. A.)

⁹Act Mar. 1, 1875, c. 114, § 4, 18 Stat. 336, U. S. Comp. Stat. 1901, p. 1261.

¹⁰In re Wood, 140 U. S. 285, 35 L. ed. 508, 11 Sup. Ct. Rep. 738; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667.

¹¹Neal v. Delaware, 103 U. S. 394, 26 L. ed. 573; In re Wood, 140 U. S. 285, 35 L. ed. 508, 11 Sup. Ct. Rep. 738. See also, Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

¹⁴See ante, § 1704.

be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

Last clause of § 4, c. 114, act March 1, 1875, 18 Stat. 336, U. S. Comp. Stat. 1901, p. 1261.

The foregoing provision is preceded in the act of 1875, by a prohibition similar to that contained in the act of 1879 set forth in the preceding section.¹⁵ The act of a judge in selecting jurors is ministerial and not judicial, and a judge who violates the above provision may be punished by the Federal court.¹⁶

§ 1706. Venire, how issued and served.

Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ.

R. S. § 803, U. S. Comp. Stat. 1901, p. 625.

The above section was carried into the Revised Statutes from an act of 1789.¹⁹ The Federal courts conforming to the State practice²⁰ may have jurors drawn by the State authorities, and may address only a grand or general venire to the marshal commanding him to cause a certain number of jurors from certain towns to come before the court. The court may also deliver to the marshal with the grand venire, subordinate venires addressed to the constables or other municipal officers to be served upon the municipal authorities, and upon the jurors drawn by them, and returned by such constables to the court or to the marshal to enable him to make up his return upon the grand venire.¹ A venire for a jury may properly be issued after a term has begun and it need not recite that the jurors are summoned for the trial of a particular case.² It must however be properly addressed, and such venire, improperly addressed has been held void.³

§ 1707. Talesmen for petit juries.

When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy

¹⁵Ante, § 1704.

¹⁶Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676.

¹⁹Act Sept. 24, 1789, c. 20, § 29, 1 Stat. 88.

²⁰See ante, § 900.

¹United States v. Richardson, 28 Fed. 61.

²Andersen v. United States, 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. Rep. 689.

³See United States v. Antz, 16 Fed. 119, 4 Woods, 174.

shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.⁶

R. S. § 804, U. S. Comp. Stat. 1901, p. 625.

This section is neither expressly or impliedly repealed by the act of 1879⁷ prescribing the mode in which juries are to be drawn. Hence, when from challenges or otherwise there is not a petit jury to determine any cause, the court may direct the marshal to fill the panel from the bystanders.⁸ The bystanders are sufficiently present if they are in attendance when returned by the marshal as present.⁹

§ 1708. How special juries returned.

When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States.

R. S. § 805, U. S. Comp. Stat. 1901, p. 626.

The above section was originally enacted in 1802.¹¹

§ 1709. Number of grand jurors—how panel completed.

Every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

R. S. § 808, U. S. Comp. Stat. 1901, p. 626.

⁶Ante, § 1706.

⁷Ante, § 1703.

⁸St. Clair v. United States, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; Lovejoy v. United States, 128 U. S. 171, 32 L. ed. 389, 9 Sup. Ct. Rep. 57; United States v. Mun-

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ford, 16 Fed. 164; United States v. Rose, 6 Fed. 136.

⁹United States v. Loughery, 13 Blatchf. 267, Fed. Cas. No. 15,631.

¹¹Act April 29, 1802, c. 31, § 30, 2 Stat. 167.

The above section was originally enacted in 1865.¹² It applies only to circuit and district courts¹³ the territorial courts being free to act in obedience to their own laws.¹⁴ The court has power to determine the number of grand jurors up to twenty-three¹⁵ and it may of its own motion excuse grand jurors and no complaint can be made where those substituted are not disqualified.¹⁶ This section is not either directly or by implication repealed by the act of 1879 as to the method of drawing jurors.¹⁷ The meaning of that act is that no regular jury, grand or petit, should be drawn or called into court except drawn or called in the prescribed manner, but the court has the power under the above section to summon from the body of the district, in cases of emergency, in order to complete a grand jury.¹⁸ It is said however that this power of the court to order the marshal to summon jurors to complete the grand jury can be exercised only when less than sixteen persons answer to the first summons and hence where more than sixteen attend and less than the number ordered by the court, the deficiency should be supplied by ordering additional names drawn from the box as provided by the act of 1879.¹⁹ The fact that more than the requisite number of jurors were summoned does not invalidate an indictment.²⁰

§ 1710. — appointment of foreman.

From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

R. S. § 809, U. S. Comp. Stat. 1901, p. 627.

This section was originally enacted in 1865.³

§ 1711. — when summoned.

No grand juries shall be summoned to attend any circuit or district court unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed,

¹²Act Mar. 3, 1865, c. 86, § 1, 13 Stat. 500.

¹³Ex parte Farley, 40 Fed. 70.

¹⁴Downes v. Bidwell, 182 U. S. 269, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Jackson v. United States, 102 Fed. 473, 42 C. C. A. 452.

¹⁵United States v. Eagan, 30 Fed. 608. See also, United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16,550.

¹⁶United States v. Jones, 69 Fed. 973.

¹⁷See ante, § 1703; United States v. Eagan, 30 Fed. 608.

¹⁸United States v. Eagan, 30 Fed. 610.

¹⁹Per Thayer, J., United States v. Eagan, 30 Fed. 611.

²⁰United States v. Mitchell, 136 Fed. 905.

³Act Mar. 3, 1865, c. 86, § 1, 13 Stat. 500.

orders a venire to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found.

R. S. § 810, U. S. Comp. Stat. 1901, p. 627.

The immediate purpose of this section was to do away with the presence of the grand jury at every term of a circuit or district court, and leave it discretionary with the judges whether and when such body should be convened.⁵ Under the above section the judge may at any term, and at any time therein, summon a grand jury.⁶ An order entered by the clerk by authority of the judge is of the same effect as if entered by the judge himself.⁷ The issuance of a venire is however necessary,⁸ and its absence is a ground of challenge to the array if taken advantage of at the proper time.⁹

§ 1712. — discharge.

The circuit and district courts, the district courts of the Territories, and the supreme court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

R. S. § 811, U. S. Comp. Stat. 1901, p. 627.

The above section was carried into the Revised Statutes from an act of 1856.¹⁰ The obligation of secrecy imposed on a grand juror by his oath with regard to proceedings before the body is not removed by his discharge, and a disclosure renders him liable for contempt.¹¹

§ 1713. How often persons to be summoned as grand jurors.

No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he

⁵United States v. Antz, 16 Fed. 949; United States v. Antz, 16 Fed. 119.

⁶McDowell v. United States, 159 435, Fed. Cas. No. 16,134.
U. S. 602, 40 L. ed. 274, 16 Sup. Ct. Rep. 111.

⁷United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

⁸Clawson v. United States, 114 U. S. 487, 29 L. ed. 179, 5 Sup. Ct. Rep.

⁹United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134.

¹⁰Act Aug. 16, 1856, c. 124, § 7, 11 Stat. 50.

¹¹In re Atwell, 140 Fed. 368; In re Summerhayes, 70 Fed. 769.

has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge.

R. S. § 812, U. S. Comp. Stat. 1901, p. 628.

The above section was carried into the Revised Statutes from an act of 1870.¹⁵ It does not apply to the courts of the District of Columbia since under the Revised Statutes of the District only one year need elapse.¹⁶ The above provision has been superseded as to petit jurors by an act of 1879,¹⁷ changing the period from two years to one.¹⁸ The fact that a grand juror has served before as such within two years is no ground for quashing the indictment.¹⁹ Since the cause of challenge on the ground of prior service as juror is set forth by the section, the State practice in that respect cannot be followed.²⁰

§ 1714. — how often summoned as petit jurors.

No person shall serve as a petit juror more than one term in any one year.

Part of § 2, c. 52 of act June 30, 1879, 21 Stat. 43, U. S. Comp. Stat. 1901, p. 624.

Other portions of this section are given in preceding Code sections.³ The above provision applies only to petit jurors⁴ the provision as to grand jurors being set forth in a preceding section.⁵

§ 1715. Peremptory challenges.

When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether

¹⁵Act July 15, 1870, c. 298, § 2, 16 Stat. 363.

¹⁶R. S. Dist. of Columbia, § 861; United States v. Nardello, 4 Mackey, 503.

¹⁷See post, § 1714.

¹⁸United States v. Clark, 46 Fed. 640. See also, Walker v. Collins, 50 Fed. 739.

¹⁹United States v. Reeves, 3 Woods, 199, Fed. Cas. No. 16,139. See also United States v. Clark, 46 Fed. 640.

²⁰Walker v. Collins, 50 Fed. 739.

³See ante, §§ 1703, 1704.

⁴See United States v. Clark, 46 Fed. 640.

⁵Ante, § 1713.

to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.

R. S. § 819, U. S. Comp. Stat. 1901, p. 629.

The section was originally enacted in 1872.⁸ Prior to the above enactment it was declared that the Federal courts might by rule adopt the State practice as to peremptory challenges,⁹ and the right has been denied where the court had not by rule adopted such practice.¹⁰ The above enactment sets forth the present procedure, the only difficulty being as to the meaning of the word "felony" as used in the section. The rule has been laid down that an offense is a felony within the meaning of the section (1) where the offense is declared by statute expressly or impliedly to be a felony; (2) where Congress does not define an offense but simply punishes it by its common-law name, and at common law it is a felony; (3) where Congress adopts a State law as to an offense, and under such law it is a felony.¹¹ Where several parties are indicted for a joint felony they are deemed a single party for the purposes of all challenges.¹² But defendants in different actions cannot be deprived of their several challenges by the order of the court that the cases shall be tried together.¹³ The proper time to challenge is between the calling of the juror and his taking the oath in the case.¹⁴ It is not error if the trial judge fails to enforce conformity to State practice in the order of peremptory challenges.¹⁵

Challenges for favor are tried by the court, and an alleged error duly excepted to is subject to review by the appellate court. The decision of the trial judge however will not be set aside except for manifest error.¹⁶ Conditional or qualified challenges without assigning grounds, and having the effect of setting aside a juror until the panel is exhausted may be allowed in Federal courts sitting in a State where the practice exists, if such court has adopted such State practice under its power to adopt rules.¹⁷ The fact that peremptory challenges are now allowed the government does not negative the power to allow qualified challenges.¹⁸

⁸Act June 8, 1872, c. 333, § 2, 17 Stat. 282.

⁹United States v. Shackleford, 18 How. 588, 15 L. ed. 495; United States v. Shackleford, 18 How. 588 15 L. ed. 495.

¹⁰United States v. Devlin, 6 Blatchf. 73, Fed. Cas. No. 14,953.

¹¹United States v. Coppersmith, 4 Fed. 207, 2 Flap. 546; and see Harrison v. United States, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 961.

¹²United States v. Hall, 44 Fed. 883, 10 L.R.A. 323. See also Mutual Life, etc. Co. v. Hillmon, 145 U. S. 293, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; Stone v. United States, 64 Fed. 672, 12 C. C. A. 451.

¹³Mutual Life, etc. Co. v. Hillmon, 145 U. S. 293, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; Betts v. United States, 132 Fed. 228, 65 C. C. A. 452.

¹⁴Brewer v. Jacobs, 22 Fed. 217.

¹⁵Radford v. United States, 129 Fed. 53, 63 C. C. A. 491.

¹⁶Press Pub. Co. v. McDonald, 73 Fed. 440, 19 C. C. A. 516; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

¹⁷Sawyer v. United States, 202 U. S. 151, 50 L. ed. 972, 26 Sup. Ct. Rep. 575.

¹⁸Ibid.

§ 1716. — excess peremptory challenges to be disallowed by court.

If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made.

R. S. § 1031, U. S. Comp. Stat. 1901, p. 721.

§ 1717. Challenges in summary trials.

At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause in such cases shall be tried by the court without the aid of triers.

R. S. § 4303 U. S. Comp. Stat. 1901, p. 2593.

The above section was carried into the Revised Statutes from an act of 1864.¹

§ 1718. Special causes of challenge in bigamy cases, etc.

In any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by either of the foregoing sections [i. e., polygamy, etc.], or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States,¹ or the act of July 1, 1862, entitled "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah," or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and

¹Act June 11, 1864, c. 121, § 6, 13 Stat. 125.

this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent.

§ 5, of act March 22, 1882, c. 47, 22 Stat. 31, U. S. Comp. Stat. 1901, p. 3634.

§ 1719. Disqualification of jurors in civil rights cases.

No person shall be a grand or petit juror in any court of the United States, upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of title "Civil Rights" [R. S. §§ 1977-1991,] and of title "Crimes," [R. S. §§ 5323-5550], for enforcing the provisions of the Fourteenth Amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly counseled, advised, or voluntarily aided any such combination or conspiracy.

R. S. § 822, U. S. Comp. Stat. 1901, p. 630.

The above section was carried into the Revised Statutes from an act of 1871.³

§ 1720. District grand juries may act in circuit cases.

The grand jury impaneled and sworn in any district court may take cognizance of all crimes and offenses within the jurisdiction of the circuit court for said district as well as of said district court.

R. S. § 813, U. S. Comp. Stat. 1901, p. 628.

The above section was originally enacted in 1846.⁵

§ 1721. Juries of circuit and district courts interchangeable.

Whenever any circuit and district court of the United States

³Act April 20, 1871, c. 22, § 5, 17 Stat. 15.

⁵Act Aug. 8, 1846, c. 98, § 3, 9 Stat. 72.

shall be held at the same time and place they shall be authorized, and required, if the business of the courts will permit, to use interchangeably the juries in either court drawn according to the provisions of said act [i. e. act June 30, 1879⁶].

Act August 8, 1888, c. 785, 25 Stat. 386, amending § 2, c. 52 of act June 30, 1879, 21 Stat. 43, U. S. Comp. Stat. 1901, p. 624.

The acts dividing particular judicial districts into divisions, frequently make provisions similar to the above.⁷

§ 1722. Special provisions regarding service of same jurors in both circuit and district courts.

In some districts the terms of circuit and district court commence at the same time at particular places of holding court and Congress has sometimes provided that "one grand and petit jury only shall be summoned to serve in both said courts when held at the same place," or has made other similar provision.⁹

Author's section.

§ 1723. From what parts of district jurors returned.

Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services.

R. S. § 802, U. S. Comp. Stat. 1901, p. 625.

The above section was originally enacted in 1789.¹² It has been expressly held to be constitutional and not in conflict with the sixth Amendment of the United States Constitution, which provides that in all criminal cases the accused shall enjoy the right to a speedy trial by an impartial jury.¹³ The part of the district from which the jurors are drawn rests

⁶See ante, § 1703.

⁷See post, § 1723.

⁹Colorado: act Apr. 20, 1880, c. 58, § 2, 21 Stat. 76, U. S. Comp. Stat. 1901, p. 330. Idaho: act July 5, 1892, c. 145, § 2, 27 Stat. 72, U. S. Comp. Stat. 1901, p. 342. Michigan: act June 19, 1878, c. 326, § 6, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 371. Minnesota: act Apr. 29, 1890, c. 167, § 6, 26 Stat. 73, U. S. Comp. Stat. 1901, p. 376. Mississippi: act Apr. 4, 1888, c. 58, § 6, 25 Stat. 79, U. S. Comp. Stat. 1901, p. 392. Missouri: act Feb. 28, 1887, c. 271, § 3, 24 Stat.

425, U. S. Comp. Stat. 1901, p. 386. North Dakota: act June 29, 1906, c. 3595, § 5, 34 Stat. 610. South Dakota: act May 9, 1902, c. 785, § 3, 32 Stat. 197, U. S. Comp. Stat. 1905, p. 110. Vermont: see, R. S. § 818, U. S. Comp. Stat. 1901, p. 629. Washington: act Apr. 5, 1890, c. 65, § 2, 26 Stat. 45, U. S. Comp. Stat. 1901, p. 438.

¹²Act Sept. 24, 1789, c. 20, § 29, 1 Stat. 88.

¹³United States v. Ayres, 46 Fed. 651. See ante, § 1700.

with the court.¹⁴ Hence where the court meets in three different places in the district and there are three jury boxes, one for each place of meeting, the court may direct from what box the jury shall be drawn.¹⁵ Where however a district is subdivided the jurors are to be selected from the territorial limits of the particular division.¹⁶ This section applies to grand as well as petit juries.¹⁷

§ 1724. Provisions as to residence of jurors in districts containing judicial divisions.

In many of the statutes creating two or more judicial divisions in a district there is a provision that "all grand and petit jurors summoned for service in each division shall be inhabitants thereof" or "residents" thereof.¹⁸ Districts for which Congress has made such or similar provision are enumerated in the footnotes and the practitioner should keep advised of any new enactments of similar character.

Author's section.

¹⁴United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16,409; United States v. Woodruff, 4 McLean, 105, Fed. Cas. No. 16,758.

¹⁵United States v. Munford, 16 Fed. 166.

¹⁶United States v. Wan Lee, 44 Fed. 707. See post, § 1723.

¹⁷Agnew v. United States, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235.

¹⁸Alabama: act May 2, 1884, c. 38, § 3, 23 Stat. 18, U. S. Comp. Stat. 1901, p. 318; act Mar. 3, 1905, c. 1419, § 7, 33 Stat. 988, U. S. Comp. Stat. 1905, p. 79 ("inhabitants thereof"). California: act May 29, 1900, c. 594, § 6, 31 Stat. 220, U. S. Comp. Stat. 1901, p. 328 ("residents of such division"). Georgia: act Jan. 29, 1880, c. 17, § 8, 21 Stat. 63, U. S. Comp. Stat. 1901, p. 335; act Feb. 15, 1889, c. 168, § 6, 25 Stat. 672, U. S. Comp. Stat. 1901, p. 337 ("residents"); act Apr. 12, 1900, c. 185, § 5, 31 Stat. 74, U. S. Comp. Stat. 1901, p. 340 ("from citizens residing in"). In the eastern division of the northern district of Georgia jurors must be "residents thereof and shall be selected from such counties as the court may direct" by act Feb. 28, 1901, c. 621, § 5, 31 Stat. 819, U. S. Comp. Stat. 1901, p. 342;

act June 30, 1902, c. 1338, § 7, 32 Stat. 551 and act Mar. 3, 1905, c. 1341, § 7, 33 Stat. 1000, in U. S. Comp. Stat. 1905, p. 86, 88. Iowa: act June 1, 1900, c. 601, § 5, 31 Stat. 250, U. S. Comp. Stat. 1901, p. 354 ("selected from citizens residing in"). Louisiana: act Aug. 8, 1888, c. 789, § 5, 25 Stat. 388, U. S. Comp. Stat. 1901, p. 366 ("residents"); act Aug. 13, 1888, c. 869, § 6, 25 Stat. 438, U. S. Comp. Stat. 1901, p. 367 ("residents"). Michigan: act June 19, 1878, c. 326, § 6, 20 Stat. 176, U. S. Comp. Stat. 1901, p. 37 (selected from district in which reside and in which terms are held). Mississippi: act July 18, 1894, c. 144, § 6, 28 Stat. 115, U. S. Comp. Stat. 1901, p. 383 ("residents"). Missouri: act Jan. 24, 1901, c. 164, § 6, 31 Stat. 739, U. S. Comp. Stat. 1901, p. 390; act Jan. 31, 1905, c. 287, § 6, 33 Stat. 627, U. S. Comp. Stat. 1905, p. 104 ("residents"). Ohio: act June 8, 1879, c. 169, § 6, 20 Stat. 102, U. S. Comp. Stat. 1901, p. 402; act Feb. 4, 1880, c. 18, § 7, 21 Stat. 64, U. S. Comp. Stat. 1901, p. 404 ("residents"). South Dakota: act Nov. 3, 1893, c. 10, § 6, 28 Stat. 5, U. S. Comp. Stat. 1901, p. 412 ("residents"). Tennessee: act June 11, 1880, c. 203, § 7, 21 Stat. 176, U.

§ 1725. Special provisions as to summoning jurors in particular districts and divisions.

There are special provisions as to the summoning of jurors in certain judicial districts which are of course controlling in the particular districts affected.^{[a]-[d]}

Author's section.

[a] Arkansas.

By R. S. § 814, it is provided that "in the western district of Arkansas such number of jurors shall be summoned at every term of the district court thereof, to be held at Helena, as may have been ordered at a previous term, or by the district judge in vacation. And a grand jury may be summoned to attend any such term when ordered by the court, or by the judge in vacation. In case of a deficiency of jurors, talesmen may be summoned by order of the court."

[b] Colorado.

By act of 1880, regarding terms of court in Colorado it was provided that "whenever the terms of the said circuit and district courts shall be held at the same time and place, grand and petit jurors summoned to attend in either of said courts may serve in the other of said courts, and but one grand or petit jury shall be summoned to attend on said courts at one and the same time; but this provision shall not prevent either of said courts from procuring the attendance of several panels of jurors successively, as the business of the courts may require."³

[c] Indiana and Kentucky.

By R. S. § 815, it is provided that "in the several districts of Kentucky and Indiana, such number of jurors shall be summoned by the marshal at every term of the circuit and district courts, respectively, as may have been ordered of record at the previous term; and in case there is not a sufficient number of jurors in attendance at any time, the court may order such number to be summoned as, in its judgment, may be necessary to transact the business of the court. And a grand jury may be summoned to attend every term of the circuit or district court by order of the court. The marshal may summon juries and talesmen in case of a deficiency, pursuant to an order of the court made during the term, and they shall serve for such time as the court may direct."

[d] Michigan and Minnesota.

The act of 1887 providing for terms at Bay City, Michigan, provides that "each of said courts [i. e., circuit and district] is authorized and required

S. Comp. Stat. 1901, p. 416 ("residents"); act Feb. 7, 1900, c. 10, § 6, 31 Stat. 6, U. S. Comp. Stat. 1901, p. 419 ("residents").
³Act Apr. 20, 1880, c. 53, § 2, 21 Stat. 76, U. S. Comp. Stat. 1901, p. 330.

to make all such rules and regulation relative to the summoning of grand and petit jurors to attend upon the sessions of said court at Bay City and relative to matters of practice therein, that may from time to time be deemed necessary.”⁸ By an act of 1890 respecting judicial divisions in Minnesota it is provided that “a grand and petit jury shall be summoned for each of said terms [i. e., of the circuit and district courts], which petit jury shall be competent to sit and act as such jury in either or both of said courts at such terms; provided, that the judge of the district court may, in his discretion, dispense with the summoning or impaneling of more than one grand jury in each year in any of said divisions.”⁹

[e] Mississippi, Missouri and Montana.

An act of 1882 creating divisions in the northern Mississippi district declared that “juries shall be summoned for the additional courts hereby created as now provided by law for the summoning of juries in said northern district.”¹⁰ There is a similar provision in an act of 1887 creating divisions in the Missouri districts.¹¹ An act of 1888 creating additional terms in Montana authorized the summoning of grand and petit juries to serve thereat.¹²

[f] New York and North Carolina.

By R. S. § 806, as amended in 1882,¹³ it is provided that “no jury shall be drawn for service exclusively in the circuit court for the northern district of New York at the terms thereof required by law to be held at Albany and Syracuse, or at the adjourned term thereof required by law to be held at Utica, if a jury is drawn to serve in the district court held at the same time and places with said terms and adjourned term, but it shall be used for the trial of issues of fact arising in civil and criminal causes in said circuit court; and the verdicts of said jury and all proceedings upon the trial of said issues shall be of the same effect as if the said jury had been drawn to serve in the said circuit court.” By R. S. § 816 it is provided that “the circuit and district courts for either of the districts of North Carolina may order a grand or petit jury, or both, to attend any special term thereof, by an order to be entered of record thirty days before the day on which such special term is appointed to convene.”¹⁷

[g] Oklahoma and Pennsylvania.

The act admitting Oklahoma provides for one grand jury in each year in

⁸Act Feb. 28, 1887, c. 269, § 2, 24 Stat. 425, U. S. Comp. Stat. 1901, Stat. 73, U. S. Comp. Stat. 1901, p. 386.

¹²Act Aug. 18, 1888, c. 391, § 1, 25 Stat. 443, U. S. Comp. Stat. 1901, p. 392.

⁹Act Apr. 29, 1890, c. 167, § 6, 26 Stat. 473, U. S. Comp. Stat. 1901, p. 392.

¹⁰Act June 15, 1882, c. 218, § 2, 22 Stat. 101, U. S. Comp. Stat. 1901, p. 626.

¹¹Act Feb. 28, 1887, c. 271, § 3, 24 Stat. 425, U. S. Comp. Stat. 1901, p. 629.

each of the circuit and district courts for each district.¹⁹ An act of 1902 concerning the middle district of Pennsylvania declares "that the number of traverse or petit jurors summoned to attend at any term of the said courts [i. e., circuit and district courts] shall not be less than twenty-four nor more than forty-eight, as the said courts by their order from time to time shall direct."²⁰

[h] South Carolina and South Dakota.

By R. S. § 817 it is provided that "the grand and petit juries for the district court sitting in the western district of South Carolina shall be drawn from the inhabitants of said district who are liable, according to the laws of said State, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term." In the South Dakota district it is provided by act of 1893 that "all grand and petit juries for the circuit and district courts shall be drawn by the clerk of the circuit court, and all grand and petit jurors summoned for service in each division shall be residents of such division."²

[i] Vermont.

By R. S. § 807 it is provided that "the clerk of the district court for Vermont shall not cause a petit jury to be summoned or returned to any session in which there shall appear to be no issue proper for trial by jury, unless by special order of the judge."

¹⁹Act June 16, 1906, c. 3335, § 13, 34 Stat. 275. ²Act Nov. 3, 1893, chap. 10, § 6, 28 Stat. 5, U. S. Comp. Stat. 1901,

²⁰Act June 30, 1902, c. 1335, § 3, 32 Stat. 549, U. S. Comp. Stat. 1901, p. 412.
p. 108.

CHAPTER 53.

WITNESSES.

- § 1735. Competency of witnesses in Federal courts—State laws followed.
- § 1736. Persons convicted of perjury incompetent witnesses.
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- § 1752. —penalty for refusal or neglect to testify.
- § 1753. —fees and mileage of witnesses testifying.
- § 1754. Bankruptcy—attendance of witnesses outside the State.
- § 1755. Punishment of recalcitrant witnesses.

§ 1735. Competency of witnesses in Federal courts—State laws followed.

The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held.^[a]-^[c]

R. S. § 858, as amended June 29, 1906, c. 3608, 34 Stat. 618.

[a] The section prior to amendment.

Prior to the above amendment the section read as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or

against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." While all the cases set forth in the following notes to this section arose, prior to the above amendment they may be of aid to the practitioner in interpreting the amended section.

[b] — effect in general.

The statute is a remedial one, intended to remove technical disqualifications in the common-law rules of evidence and should be liberally construed.¹ Except as to those named in the proviso all parties are put on an equality with all other parties,² whether interested or not.³ The statute is not permissive merely and under it one party may compel the other to testify.⁴ But a party to a Federal action at law cannot be examined at the instance of the other party before trial.⁵ It does not, however, effect the exclusion of the testimony of a husband or wife on the grounds of public policy.⁶ But in bankruptcy a creditor, although the wife of the bankrupt, is a competent witness.⁷

[c] — to what courts and actions applicable.

While this section applies to the courts of the district of Columbia,¹⁰ it does not apply to the Territorial courts.¹¹ The rules followed in the Court of Claims regarding witnesses,¹² are given elsewhere. By the first clause of the section all actions, both civil and criminal, are included, but the second clause is in terms restricted to civil actions only.¹⁴ The disability of defendants in criminal actions as witnesses has been removed.¹⁵ The phrase "civil actions" includes all judicial controversies in which the rights of property are involved, whether between private parties

¹United States v. Clark, 96 U. S. 37, 24 L. ed. 696; Texas v. Chiles, 21 Wall. 488, 22 L. ed. 650.

²Lowrey v. Kusworm, 66 Fed. 539.

³Cornett v. Williams, 20 Wall. 226, 22 L. ed. 254; Kerr v. Modern Woodmen, etc. 117 Fed. 593, 54 C. C. A. 655.

⁴Texas v. Chiles, 21 Wall. 488, 22 L. ed. 650; Railroad Co. v. Pollard, 22 Wall. 350, 22 L. ed. 879; Lowrey v. Kusworm, 66 Fed. 540.

⁵Easton v. Hodges, 7 Biss. 326, Fed. Cas. No. 4,258.

⁶Hopkins v. Grimshaw, 165 U. S. 349, 41 L. ed. 740, 17 Sup. Ct. Rep. 401; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779.

⁷In re Richards, 10 Chi. Leg. News. 275, 20 Fed. Cas. No. 11,770.

¹⁰Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268.

¹¹Corbus v. Leonhardt, 114 Fed. 10, 51 C. C. A. 636; Good v. Martin, 95 U. S. 90, 24 L. ed. 341; Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659. Under the amended section however the territorial laws as to competency of witnesses are to be followed.

¹²See ante, § 1461.

¹⁴Logan v. United States, 144 U. S. 300, 36 L. ed. 442, 12 Sup. Ct. Rep. 617. See also, Green v. United States, 9 Wall. 658, 19 L. ed. 806.

¹⁵See post, § 1737.

or such parties and the government.¹⁶ A proceeding by habeas corpus is within the meaning of the term,¹⁷ as is also a seizure of property for violation of the internal revenue law and the controversy arising upon a claim interposed thereto by a third party.¹⁸

[d] — suits by or against executors, administrators, etc.

The proviso of the above section as to the competency of the parties to testify in actions by or against executors, administrators or guardians has no relation to criminal cases.¹ Neither does it apply to the proof of a debt against an estate in bankruptcy, which is a proceeding in rem solely,² nor to an action by an interested party against the heirs at law,³ nor where the executor is a mere nominal party.⁴ The executor, administrator or guardian must be a party to the record in order to bring the case under the proviso.⁵ But the fact that a party complainant has executed an assignment of all his interest to his wife and has ordered the clerk of the court that his interest in the case be marked for her use, does not effect his position as a party on the record.⁶ If the testimony was competent at the time of its taking it is not effected under the statute by the fact that the witness has died and his administrator is carrying on the suit.⁷

The phrase "unless required to testify thereto by the court" applies alike to common-law actions and suits in equity.⁸ Either party may present an application to be required to testify by the court,⁹ but such application will not be granted except in special cases where it would be a great hardship not to allow such witness to testify.¹⁰

[e] — State laws as rules of decision.

Prior to the amendment of 1906¹⁴ state statutes and decisions upon

¹⁶Green v. United States, 9 Wall. Rep. 219; Berry v. Sawyer, 19 Fed. 655, 19 L. ed. 806; United States v. 286.

Ten Thousand Cigars, Woolw. 123, ⁶De Roux v. Girard, 112 Fed. 97, Fed. Cas. No. 16,451. 50 C. C. A. 139.

¹⁷In re Reynolds, Fed. Cas. No. ⁷Sheidley v. Aultman, 18 Fed. 666, 11,721. ⁸Robinson v. Mandell, 3 Cliff. 169,

¹⁸United States v. Ten Thousand ⁹Idem. Fed. Cas. No. 11,959.

Cigars, Woolw. 123, Fed. Cas. No. ¹⁰Eslava v. Mazaugo, 1 Woods, 16,451. 623, Fed. Cas. No. 4,527.

¹Logan v. United States, 144 U. S. ¹⁴King v. Worthington, 104 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 44, 26 L. ed. 652; Connecticut, etc.

617. ²In re Merrill, 9 Ben. 165, Fed. ¹⁵King v. Shaefer, 94 U. S. 457, 24 L. Cas. No. 9,466. ed. 251; White v. Wansey, 116 Fed.

³Fitzpatrick v. Graham, 122 Fed. ¹⁶De Roux v. Girard, 112 Fed. 97, 403, 58 C. C. A. 619. 50 C. C. A. 634; De Beaumont

⁴Russell v. Russell, 129 Fed. 441. ¹⁷Sheidley v. Aultman, 18 Fed. 666, 494; Morris v. Norton, 75 Fed. 912,

⁵Potter v. Chicago, etc. Bank, 102 ¹⁸Robinson v. Mandell, 3 Cliff. 169, 21 C. C. A. 553; Stephens v. Bernays, 42 Fed. 488; Crawford v. Moore, 23

U. S. 163, 26 L. ed. 111; Monongahela, etc. Bank v. Jacobus, 109 U. ¹⁹Idem. Fed. Cas. No. 11,959. Fed. 824; Rice v. Martin, 8 Fed. 476,

S. 275, 27 L. ed. 935, 3 Sup. Ct. ²⁰Eslava v. Mazaugo, 1 Woods, 623, Fed. Cas. No. 4,527. 7 Sawy. 337.

matters in which the section itself provided the rule, were not controlling,¹⁵ though the competency of the witnesses in all other respects was determined by State law.¹⁶

[f] — waiver of incompetency.

An objection to the competency of a witness is waived where such objection was not made at the time the witness was sworn nor at any time during trial.³

§ 1736. Persons convicted of perjury incompetent witnesses.

Every person [i. e. who is guilty of perjury] . . . shall, moreover, hereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

Part of R. S. § 5392, U. S. Comp. Stat. 1901, p. 3653.

The omitted portion of the above section defines the crime of perjury and prescribes the punishment therefor.

§ 1737. Defendants in criminal cases as witnesses.

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.^[a] And his failure to make such request shall not create any presumption against him.^[b]

Act March 16, 1878, c. 37, 20 Stat. 30, U. S. Comp. Stat. 1901, p. 660.

[a] Defendant may testify at his own request.

The above provision frees the defendant from his common-law disability and makes him a competent witness when he so requests.⁶ It applies to cases where several defendants are indicted together so as to make each of them competent to testify;⁷ but it does not confer any peculiar exemption and hence the credibility of the defendants statements

¹⁵Travis v. Nederland, etc. Ins. Co. 104 Fed. 486, 43 C. C. A. 653. See De Beaumont v. Webster, 71 Fed. 226.

¹⁶Goodwin v. Fox, 129 U. S. 601, 32 L. ed. 805, 9 Sup. Ct. Rep. 367. See Scammon v. Hobson, 1 Hask. 406, Fed. Cas. No. 12,434.

³Bise v. United States, 144 Fed. 374,—(C. C. A.)

⁶United States v. Hollis, 43 Fed. 248; Wolfson v. United States, 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422.

⁷Wolfson v. United States, 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422.

may be attacked,⁸ or he may be disqualified by proof of the commission of an infamous crime.⁹ It would be improper for the government to call upon a defendant to testify in the absence of any request by him.¹⁰

[b] No presumption in failure to testify.

The fact that the defendant fails to testify creates no presumption against him, and it is error to allow unfavorable comment on that fact to be addressed to the jury.¹² Where, however, the proceedings are not criminal, failure of the defendants to testify in their own behalf, and explain doubtful matters may be commented upon and used to their disadvantage.¹³

§ 1738. No person compelled to be witness against himself.

No person . . . shall be compelled in any criminal case to be a witness against himself.^{[a]-[b]}

Part of Fifth Amendment, United States Constitution.

[a] In general—what constitutes compulsion.

The Fifth Amendment is given in full in a preceding chapter of this Code.¹⁷ While this provision applies only to criminal cases,¹⁸ the term "criminal case" is to be given a broad construction.¹⁹ Thus, a civil suit to recover a penalty for violating labor laws is criminal in its nature and the defendant may refuse to testify.²⁰ So also a proceeding to forfeit a person's goods for an offense against the laws, though civil in its nature, is within the meaning of the provision.¹ The criminal prosecution to which the witness may be liable, includes not only one pending, but also any that might thereafter be brought.² It is not confined to hearings on an indictment, but extends to proceedings in bankruptcy,³ and before a grand jury,⁴ and it includes not only defendants, but all witnesses.⁵ A witness cannot, however, refuse to testify merely on the ground that his testimony

⁸Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610.

⁹United States v. Hollis, 43 Fed. 248.

¹⁰Wolfson v. United States, 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422. See 5th Amend, U. S. Const.

¹²Wilson v. United States, 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. Rep. 765; McKnight v. United States, 115 Fed. 983, 54 C. C. A. 358.

¹³United States v. Lee Huen, 118 Fed. 442.

¹⁷Ante, § 1571.

¹⁸Ex parte Meador, 1 Abb. 317, Fed. Cas. No. 9,375; Ex parte Strouse, 1 Sawyer, 605, Fed. Cas. No. 13,548; In re Phillips, 10 Int. Rev. Rec. 107, Fed. Cas. No. 11,097.

Fed. Proc.—89.

¹⁹Counselman v. Hitchcock, 142 U. S. 563, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195.

²⁰Lees v. United States, 150 U. S. 480, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

¹Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

²In re Hess, 134 Fed. 111.

³In re Rosser, 96 Fed. 308, see also In re Hark, 136 Fed. 986. A bankrupt pleading incriminating entries should be required to produce books to determine fact of incrimination. In re Hess, 134 Fed. 109.

⁴Brown v. Walker, 161 U. S. 597, 40 L. ed. 819, 16 Sup. Ct. Rep. 644.

⁵United States v. Kimball, 117 Fed. 156.

would disgrace him, nor on the ground that the testimony would incriminate him where the crime has been barred by statute.⁶ Nor can the privilege be claimed till the witness is sworn.⁷

The seizure or compulsory production of a man's private papers to be used against him is equivalent to compelling him to be a witness against himself.⁸ Where, however, defendants were subpoenaed to appear before a grand jury and testify, before any complaint had been brought against them, and having time before appearing to consult counsel, stated that they were willing to testify, they were not "compelled" within the meaning of the above provision.⁹ It is for the judge and not witness to decide whether, under all the circumstances, the answer will tend to incriminate.¹⁰ The benefit of immunity granted by this section is personal¹¹ and extends only to the witness and he cannot set it up in behalf of any other person or corporation.¹² The fact that the immunity granted by a Federal statute does not extend to prosecutions in a State court, gives a witness no right to refuse to testify.¹³

[b] Immunity statutes and Fifth Amendment.

In view of this amendment, a statute to be valid must afford complete immunity from future prosecution for offenses to which criminal prosecutions relate.¹⁷ Hence no statute which leaves a witness subject to prosecution after answering incriminating questions can evade the guaranty of the amendment.¹⁸ So the provision of the Revised Statutes that evidence of a witness shall not be used against him in a subsequent criminal prosecution¹⁹ does not take away the constitutional right of the defendant to refuse to testify since that provision does not supply a complete protection.²⁰ Nor is complete protection supplied by the bankruptcy act which provides that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, even if applicable in favor of a witness other than the bankrupt, and hence the immunity granted by the amendment still remains to the witness.² But the immunity granted to witnesses under the anti-trust act by an act of 1903³

⁶United States v. Kimball, 117 Fed. 156.

⁷Idem.

⁸Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. And see In re Pacific Ry. Commission, 32 Fed. 267, 12 Sawy. 559; In re Kanter, 117 Fed. 356; In re Hess, 134 Fed. 111.

⁹United States v. Kimball, 117 Fed. 156.

¹⁰Foot v. Buchanan, 113 Fed. 156.

¹¹In re Knickerbocker, etc. Co. 136 Fed. 906.

¹²Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. See also, In re Pooling, Freights, 115 Fed. 588.

¹³Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

¹⁷Counselman v. Hitchcock, 142 U. S. 586, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195.

¹⁸Idem.

¹⁹See ante, § 1741.

²⁰Counselman v. Hitchcock, 142 U. S. 585, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195; Foot v. Buchanan, 113 Fed. 156.

²In re Feldstein, 103 Fed. 269. See also, In re Hess, 134 Fed. 109.

³Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358.

and under the interstate commerce act of 1893, deprives them of their right of refusal to answer under this section.⁴ The latter act, however, grants immunity to witnesses only in cases arising under the act of 1887, regulating interstate commerce, and hence witnesses in cases arising under the act of 1890, which protects trade and commerce against unlawful restraints, are entitled to the immunity granted under this section.⁵

§ 1739. Right of accused as to witnesses in criminal cases.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor.

Part of Sixth Amendment, United States Constitution.

The term "criminal prosecution," as used in the above amendment, has a much narrower meaning than "criminal case," as used in the fifth amendment, and means a criminal prosecution against a person who is accused and who is to be tried by a petit jury.⁶ But an action brought by the United States to obtain goods alleged to be forfeited under the revenue laws is not such a criminal prosecution.¹⁰

§ 1740. Testimony before Congress not to be used in criminal proceedings.

No testimony given by a witness before either house, or before any committee of either house of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

R. S. § 859, U. S. Comp. Stat. 1901, p. 660.

The commerce laws also provide immunity for witnesses testifying in proceedings thereunder.¹³

§ 1741. — pleadings, disclosures, etc., not to be used.

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the

⁴*Brown v. Walker*, 161 U. S. 593, 195. See also *United States v. Paterson*, 150 U. S. 69, 37 L. ed. 1001, 40 L. ed. 827, 16 Sup. Ct. Rep. 657. Ante, § 1366.

⁵*Foot v. Buchanan*, 113 Fed. 156.

14 Sup. Ct. Rep. 21.

⁶*Counselman v. Hitchcock*, 142 U. S. 563, 35 L. ed. 1114, 12 Sup. Ct. Rep. 643.

¹⁰*United States v. Zucker*, 161 U. S. 482, 40 L. ed. 780, 16 Sup. Ct. Rep. 643.

¹³Ante, § 1366.

United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

R. S. § 860, U. S. Comp. Stat. 1901, p. 661.

The section was originally enacted in 1868.¹⁴ There is a somewhat similar provision as to proceedings under the commerce laws.¹⁵ Its provisions afford no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime and of sources of information which may supply other means of convicting the witness or party.¹⁶ Hence it does not take away the privilege granted by the fifth amendment, and the party may refuse to testify.¹⁷ Pleadings of parties are allegations made by the parties definitely presenting the issues to be tried and determined between them. "Discovery or evidence obtained from a party or witness by means of judicial proceeding" includes only facts or papers which the party or witness is compelled by subpoena, interrogatory or other judicial process to disclose. Hence testimony voluntarily given or evidence voluntarily produced are not within the meaning of the section, and may be introduced against the party in a criminal case.¹⁸ Under this section a party cannot be required to produce books and papers which will subject him to a penalty.¹⁹

§ 1742. Subpoenas for witnesses in another district.

Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: Provided, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.

R. S. § 876, U. S. Comp. Stat. 1901, p. 667.

The above section was originally enacted in 1793.² The provisions as to the examination of witnesses and issuance of subpoena in the Court of Claims are given elsewhere.³ If a witness lives at a distance of not greater than one hundred miles from the place of trial, whether within or without the district, he may be subpoenaed and the other party has a

¹⁴Act Feb. 26, 1868, c. 13, § 1, 15 81 Fed. 845; Ex parte Irvine, 74 Fed. Stat. 37. 954.

¹⁵Ante, § 1366.

¹⁶Counselman v. Hitchcock, 142 U. S. 169, 38 L. ed. 1122, 12 Sup. Ct. 299. ¹⁸Tucker v. United States, 151 U. S. 586, 35 L. ed. 1122, 12 Sup. Ct. 195; Johnson v. Donaldson, 3 Fed. 22, 18 Blatchf. 287.

¹⁷Counselman v. Hitchcock, 142 U. S. 586, 35 L. ed. 1122, 12 Sup. Ct. 195; Tucker v. United States, 151 U. S. 168, 38 L. ed. 114, 14 Sup. Ct. Rep. 299; United States v. Bell, ²Act Mar. 2, 1793, c. 22, § 6, 1 Stat. 335.

³See ante, §§ 1464, 1465.

right to insist on his presence in court.⁴ If the witness, however, lives outside of the district at a greater distance than one hundred miles, he cannot be subpoenaed in a civil case,⁵ although his testimony may be taken by deposition.⁶ But in criminal cases a subpoena may issue to one outside of the State.⁷ In such cases an attachment against the witness for contempt should be directed to the marshal of the court issuing it and not to an officer in the district or State in which the witness may be.⁸ Mileage under this section is determined by the ordinary, usual and shortest route of public travel and not by a mathematically straight line between the place of residence and the place of trial.⁹

§ 1743. Summoning and attendance of government witnesses.

Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

R. S. § 877, U. S. Comp. Stat. 1901, p. 667.

The above section was originally enacted in 1853.¹³ It refers expressly to witnesses attending the circuit and district courts, and hence hearings before commissions are not included.¹⁴ Witnesses under the above section must be summoned to testify not only in the cause in which the subpoena is entitled, but generally for the United States before the grand or petit jury or both.¹⁵ But the section should not be construed to forbid such subpoenas from being entitled in each cause in which the witnesses summoned under them are to testify, for if such subpoenas are issued generally without reference to the cause in which the witnesses are especially wanted, the accused has no means of knowing with certainty who are the leading witnesses against him, and hence his constitutional rights are infringed.¹⁶ The clerk should be officially informed by the district attorney of the discharge of the witnesses, but there is no reason why the discharge should be filed.¹⁷

⁴Smith v. Chicago, etc. Ry. 38 Fed. 322. 127, 3 Fed. Cas. No. 1,220. But see Parker v. Bigler, 1 Fish. Pat. Cas. 285, Fed. Cas. No. 10,726.

⁵In re Hemstreet, 117 Fed. 569; Burrow v. Kansas, etc. R. R. 54 Fed. 280. See Smith v. Chicago, etc. Ry. 38 Fed. 322. ¹³Act Feb. 6, 1853, c. 80, § 3, 10 Stat. 169.

⁶Smith v. Chicago, etc. Ry. 38 Fed. 322. See post, § 1761 et seq. ¹⁴Puleston v. United States, 85 Fed. 575.

⁷See United States v. Potter, Boyce, U. S. Pr. 98, 27 Fed. Cas. No. 16,075. ¹⁵United States v. Ralston, 17 Fed. 900.

⁸United States v. Potter, Boyce, U. S. Pr. 98, 27 Fed. Cas. No. 16,075. ¹⁶United States v. Ralston, 17 Fed. 900; U. S. Const., 6th Amend., see ante, § 1739.

⁹Jennings v. Menaugh, 118 Fed. 612; Ex parte Beebees, 2 Wall. Jr. Rep. 479. ¹⁷United States v. Taylor, 147 U. S. 697, 37 L. ed. 336. 13 Sup. Ct. Rep. 479.

§ 1744. Witnesses for indigent defendants—payment of fees.

Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States.¹

R. S. § 878, U. S. Comp. Stat. 1901, p. 668.

The above section was originally enacted in 1846.² It gives no authority to order subpoenas for a party against whom an indictment is pending before a grand jury, since such person is not "indicted in a court of the United States," as the grand jury may or may not find a true bill.³ Whether or not witnesses under this section shall be summoned, apparently rests with the discretion of the court,⁴ and the application should be made before the trial begins.⁵ Where the witness is an officer of the United States he is entitled only to his necessary expenses.⁶ A deputy postmaster is, however, not such an officer and hence the usual rule as to fees and costs prevails.⁷

§ 1745. Recognizances of witnesses in criminal cases.

Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the Unit-

¹See ante, § 738.

²Act Aug. 8, 1846, c. 98, § 11, 9 Stat. 74.

³United States v. Stewart, 44 Fed. 483.

⁴Crumpton v. United States, 138 U. S. 364, 34 L. ed. 960, 11 Sup. Ct. Rep. 355.

⁵Crumpton v. United States, 138 U. S. 364, 34 L. ed. 960, 11 Sup. Ct. Rep. 355.

⁶In re Waller, 49 Fed. 272; ante, § 729.

⁷In re Waller, 49 Fed. 272.

ed States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost.

R. S. § 879, U. S. Comp. Stat. 1901, p. 668.

The above provision may sometimes work great hardship and the discharge on his own recognizance of a witness arrested and imprisoned for want of bail has been allowed.⁸

§ 1746. — how taken in Vermont.

In the district of Vermont, all recognizances of witness, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the district or circuit court thereof, shall be to the circuit court next thereafter to be held in the said district.

R. S. § 880, U. S. Comp. Stat. 1901, p. 668.

The above section was originally enacted in 1802.¹²

§ 1747. — on application of district attorney—commitment for want thereof.

Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give cognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to

⁸United States v. Lloyd, 4 Blatchf. 12 Act Apr. 29, 1802, c. 31, 2 Stat. 427, Fed. Cas. No. 15,614. 167.

the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.

R. S. § 881, U. S. Comp. Stat. 1901, p. 669.

The above section was carried into the Revised Statutes from an act of 1846.¹⁴

§ 1748. Subpoenas to witnesses in patent cases.

The clerk of any court of the United States, for any district or Territory wherein testimony is to be taken for use in any contested case pending in the Patent-Office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpoena for any witness residing or being within such district or Territory, commanding him to appear and testify before any officer in such district or Territory authorized to take depositions and affidavits, at any time and place in the subpoena stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpoena is served upon him.

R. S. § 4906, U. S. Comp. Stat. 1901, p. 3390.

The section was carried into the Revised Statutes from the Patent act of 1870.¹⁵

§ 1749. — penalty for failure or refusal to testify.

Whenever any witness, after being duly served with such subpoena, neglects or refuses to appear, or after appearing refuses to testify, the judge of the court whose clerk issued the subpoena may, on proof of such neglect or refusal, enforce obedience to the process, or punish the disobedience, as in other like cases. But no witness shall be deemed guilty of contempt for disobeying such subpoena, unless his fees and traveling expenses in going to, returning from, and one day's attendance at the place of examination, are paid or tendered him at the time of the service of the subpoena; nor for refusing to disclose any secret invention or discovery made or owned by himself.

R. S. § 4908, U. S. Comp. Stat. 1901, p. 3390.

The section was originally enacted in 1870.¹⁶ The proper form of application to enforce obedience to a subpoena is a petition for attachment for contempt.¹⁷ But a party is not subject to attachment for contempt

¹⁴Act Aug. 8, 1846, c. 98, 9 Stat. 73.

¹⁵Act July 8, 1870, c. 230, §§ 44,

¹⁶Act July 8, 1870, c. 230, §§ 44, 45, 16 Stat. 204.

45, 16 Stat. 204.

¹⁷Brungger v. Smith, 49 Fed. 125.

on his refusal to obey a subpoena where his traveling expenses and witness fee for one day were not tendered at the time of the service of the subpoena, even though not demanded.²⁰

§ 1750. Taking testimony of witnesses for use in foreign country.

The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: Provided, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letters rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons.

R. S. § 4071, U. S. Comp. Stat. 1901, p. 2763.

§ 1751. — privilege of witness in such cases.

No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State

²⁰In re Boeshore, 125 Fed. 652.

or Territory within which such examination is had, or any other, or any foreign state.

R. S. § 4072, U. S. Comp. Stat. 1901, p. 2764.

§ 1752. — penalty for refusal or neglect to testify.

If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section forty hundred and seventy-one,¹ or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States.

R. S. § 4073, U. S. Comp. Stat. 1901, p. 2764.

Provision for compelling the testimony of witnesses in such a case are contained in R. S. § 875.²

§ 1753. — fees and mileage of witnesses testifying.

Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

R. S. § 4074, U. S. Comp. Stat. 1901, p. 2764.

§ 1754. Bankruptcy—attendance of witnesses outside the State.

No person [i. e. in bankruptcy cases] shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than 100 miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

Part of div. 4, § 41, act July 1, 1898, c. 541, 30 Stat. 556, U. S. Comp. Stat. 1901, p. 3437.

The above provision limits rather than enlarges the previous section of this Code.⁶ Its meaning is that if a person lives at a greater distance than one hundred miles from the place of hearing before the referee, or outside of the State, he cannot be summoned as a witness.⁷

¹Ante, § 1750.

²Post, § 1774.

⁶In re Cole, 133 Fed. 414.

⁷In re Cole, 133 Fed. 414; In re Hemstreet, 117 Fed. 568.

§ 1755. Punishment of recalcitrant witnesses.

The Federal courts are empowered to punish contempts committed in their presence, and disobedience of their orders, etc., by witnesses.⁸ Under this power they may deal with witnesses improperly refusing to testify or produce evidence. In addition there are particular provisions for dealing with witnesses refusing to give evidence on deposition or letters rogatory.⁹

Author's section.

⁸Ante, § 807.

⁹Post, §§ 1768, 1772, 1774.

CHAPTER 54.

EVIDENCE.

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- § 1795. —copies of foreign letters patent.
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- § 1797. Copies of Patent Office trademark papers as evidence.
- § 1798. Extracts from journals of Congress as evidence.
- § 1799. Copies of records, etc., in offices of United States consuls, etc.
- § 1800. Records certified from circuit to district court in certain States.
- § 1801. Transcribed records in North Carolina.
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- § 1803. Legislative and judicial records of States and Territories as evidence.
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- § 1810. —further supplement as evidence.
- § 1811. Statutes at large as evidence.
- § 1812. —later provision.
- § 1813. Certified copies of bankruptcy referees proceedings and papers as evidence.
- § 1814. Commerce commission's reports as evidence.

§ 1759. Cross references.

The chapters dealing specifically with equity admiralty and common law procedure, contain discussion of the principles governing mode of proof in such causes in the Federal courts.¹

Author's section.

§ 1760. Rules of evidence in criminal cases.

The laws of evidence in criminal cases in the Federal courts are those that existed in the States when the judiciary act was adopted in 1789, as modified by subsequent acts of Congress.

Author's section.

This has been repeatedly affirmed by the courts.³ The provision of the

¹Ante, §§ 1036, 1281, 917.

³United States v. Reid, 12 How. 14,671; United States v. Baugh, 1 363, 13 L. ed 1023; Logan v. United States, 144 U. S. 301, 36 L. ed. 442, 12 Sup. Ct. Rep. 629; United States v. Shepard, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273; United States v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671; United States v. Hughes 501; Erwin v. United States, 37 Fed. 488, 2 L.R.A. 229; United States v. Coppersmith, 4 Fed. 205, 2 Flip. 546.

judiciary act of 1789, now R. S. § 721,⁴ making State laws rules of decision in common-law cases, does not apply to criminal offenses.⁵ Hence the competency of a witness to testify in a murder case cannot be determined by State law.⁶ Federal statutes creating the offense of larceny cannot be enforced according to State law,⁷ and the Federal court must resort to common law for the definition of murder.⁸

§ 1761. Depositions de bene esse.

The testimony of any witness may be taken in any civil cause^{[a]-[b]} depending in a district or circuit court by deposition de bene esse,^[c] when the witness lives at a greater distance from the place of trial than one hundred miles,^{[d]-[e]} or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a Supreme or a superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause.^[f] Reasonable notice^[g] must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record,^[h] as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge au-

⁴Ante, § 12.

⁵United States v. Reid, 12 How. 363, 13 L. ed. 1023; Logan v. United States, 144 U. S. 301, 36 L. ed. 442, 12 Sup. Ct. Rep. 629; United States v. Hawthorne, 1 Dill. 423, Fed. Cas. No. 15,332; United States v. Copper-

smith, 4 Fed. 205, 2 Flip. 546. See also Lang v. United States, 133 Fed. 204, 66 C. C. A. 255.

⁶United States v. Hall, 53 Fed. 353.

⁷United States v. Stone, 8 Fed. 239.

⁸United States v. Clark, 46 Fed.

thorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.^[1]

R. S. § 663, U. S. Comp. Stat. 1901, p. 661.

[a] In general—scope and effect of statute.

The Revised Statutes provide two general methods for taking depositions to be used in the trial of law cases, one being under the writ of *dedimus potestatem*,¹² the other being as provided in this section.¹³ When it is possible to take the deposition under this section it must be done, and a *dedimus potestatem* will not issue.¹⁴ The taking of a deposition under this section is a privilege to be exercised at the option of the party desiring the testimony of the witness, and hence if he does not exercise his option, the other party cannot demand that a deposition be taken.¹⁵ The section applies to equity and admiralty cases,¹⁶ although proceedings in bankruptcy do not fall within its purview.¹⁷ While its provisions apply only to the taking of depositions within the United States and have no application to foreign depositions,¹⁸ the right to take testimony is not limited to places within the circuit¹⁹ nor within the district.²⁰ A statement of facts in writing without date or venue purporting to have been signed by the witness, but giving neither age nor residence, which statement is not shown to be under oath, nor the oath waived, nor to have been taken on notice or in the presence of the parties, nor to have been taken before any official authorized to administer oaths, and which is not accompanied by a certificate of a competent official, from which compliance with the requisites can be inferred, is not a deposition although so called, and filed in a pending suit.¹

[b] Statute how construed.

Under the act of 1789⁵ *ex parte* depositions were allowed without notice in certain cases. The authority thus given by the act being in derogation of the rules of common law was, however, always strictly construed and it was held necessary that all the requisites of the statute be complied

¹²See post, § 1765.

¹³*Giles v. Paxson*, 36 Fed. 882.

¹⁴*Turner v. Shackman*, 27 Fed. 183.
See also *North American Transp. Co. v. Howells*, 121 Fed. 694, 58 C. C. A. 442.

¹⁵*Hunter v. Russell*, 59 Fed. 964.

¹⁶*Stegner v. Blake*, 36 Fed. 183.

¹⁷*In re Dunn*, 9 Nat. Bank Reg. 487, Fed. Cas. No. 4,173.

¹⁸*Bird v. Halsy*, 87 Fed. 671, 42 L.R.A. 85; *Cortes Co. v. Tannhauser*,

18 Fed. 667; *The Alexandra*, 104 Fed. 907. See however, *Bischoffsheim v. Baltzer*, 10 Fed. 4, 20 Blatchf. 229.

¹⁹*Thum v. Andrews*, 53 Fed. 84.

²⁰*Russell v. Ashley*, Hempst. 546, Fed. Cas. No. 12,150; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. ed. 243.

¹*Lutcher v. United States*, 72 Fed. 968, 19 C. C. A. 259.

⁵Act Sept. 24, 1879, c. 20, 1 Stat. 88.

with before the testimony was admissible.⁶ Since the act of 1872,⁷ however, which requires notice to be served, by the party seeking the deposition, on the adverse party or his attorney, which provision is contained in the above section, the courts have not insisted on such a rigid compliance with the requirements.⁸ Thus the failure of the caption of the deposition to state all the names of the parties to the suit has been held not to invalidate it where all the parties had notice and knew in what case the testimony was sought.⁹ So also a deposition has been held valid although no reason for taking it was stated, where it appeared from the place of taking that the witness was more than one hundred miles from the place of trial.¹⁰

[c] Actions depending in district or circuit court.

The section provides that depositions may be taken in causes "depending in a district or circuit court." In cases in admiralty depositions are taken before issue is joined, for if it were otherwise valuable evidence might be lost by the mariners leaving port,¹⁴ and the same practice obtains to some extent in cases at law.¹⁵ Thus it has been held that a defendant on a promissory note may examine the plaintiff *de bene esse* before issue joined, the latter living at a greater distance from the place of trial than one hundred miles.¹⁶ In equity cases, however, the rule is otherwise, and it is held that this section must be construed with equity rule 68,¹⁷ providing that "such testimony may be taken in a cause after it is at issue," and hence testimony cannot be taken before issue is joined.¹⁸ Where a case has gone on appeal to the Supreme Court it is no longer "pending" within the meaning of the section and hence the provisions do not apply.¹⁹

[d] Where witness lives at a greater distance than one hundred miles.

For the purpose of taking a deposition a witness "lives" where he can be found or is sojourning or abiding for any lawful purpose,³ and the distance from the place of trial is to be determined by the ordinary, usual and shortest routes of public travel.⁴ The certificate of the magistrate

⁶*Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 175; *Carrington v. Stimson*, 1 Curt. 437, Fed. Cas. No. 2,450; *Harris v. Wall*, 7 How. 693, 12 L. ed. 875; *Luther v. The Merritt Hunt*, Newb. Adm. 4, Fed. Cas. No. 8,610; *Merrill v. Dawson*, Hempst. 563, Fed. Cas. No. 9,469; *Dunkle v. Worcester*, 5 Biss. 102, Fed. Cas. No. 4,162. See also, *Walsh v. Rogers*, 13 How. 283, 14 L. ed. 147.

⁷Act May 9, 1872, c. 146, 17 Stat. 89.

⁸*Egbert v. Citizens Ins. Co.* 7 Fed. 48, 2 McCrary, 386.

⁹*Egbert v. Citizens Ins. Co.* 7 Fed. 48, 2 McCrary, 386.

¹⁰*Egbert v. Citizens Ins. Co.* 7 Fed. 49, 2 McCrary, 386.

¹⁴*Flower v. MacGinniss*, 112 Fed. 378, 50 C. C. A. 291.

¹⁵*Idem*; and see also *Importers, etc. Bank v. Lyons*, 134 Fed. 510.

¹⁶*Lowrey v. Kusworm*, 66 Fed. 539.

¹⁷See ante, § 1052.

¹⁸*Flower v. MacGinniss*, 112 Fed. 378, 50 C. C. A. 291; *Stevens v. Missouri, etc. R. Co.* 104 Fed. 934.

¹⁹*Richter v. Jerome*, 25 Fed. 679.

³*Mutual, etc. Ins. Co. v. Robison*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R.A. 325.

⁴*Jennings v. Menaugh*, 118 Fed. 612. See also *In re Beebees*, 2 Wall. Jr. 127, Fed. Cas. No. 1,220.

taking the deposition is competent evidence as to the distance.⁵ This provision of the section does not apply to one who is casually absent from home, although he is found at a place more than one hundred miles from the place of trial.⁶

[e]—compelling answer where testimony taken in another district.

In suits in equity rule 77 confers upon the master powers sufficiently broad to enable him to compel the production of evidence and the giving of testimony in other districts when thereto empowered by the appointing court.⁹ The same results may be achieved at law under this section of the Revised Statutes.¹⁰ In case of refusal to testify or produce evidence sought, the auxiliary court, i. e., that in the district where the testimony is being taken, should compel answer or the production of the required evidence, unless constitutional privileges of the witness would thereby be infringed, or unless the testimony sought is so clearly immaterial or irrelevant as to amount to a practical abuse of the process of the court.¹¹ The auxiliary court is bound to protect the constitutional rights of the witness and prevent an abuse of its process.¹² But it has been decided, and with obvious propriety, that the auxiliary court should not go further and excuse the production of proof upon its own notions of its irrelevancy or immateriality where there is any reasonable likelihood that the primary court might take a different view.¹³ In equity causes, more potent considerations demand the adoption of this practice, since all testimony, though deemed irrelevant by the primary court itself, must be embodied in the record in order that the reviewing court may finally dispose of the case on appeal if its opinion of relevancy or materiality differs from that of the lower court.¹⁴

[f] Depositions by whom taken—must not be interested parties.

The judge of a county probate court which is duly organized with a seal is a county judge within the meaning of the statute, and hence may take depositions.¹⁶ Depositions taken by a magistrate who was a partner of the acting counsel to one of the parties have been allowed.¹⁷ While the section provides that the commissioner cannot be a counsel of either party or interested in the suit the failure to allege the latter fact has been held insufficient to invalidate a deposition where it appeared that by consent the testimony was taken in short hand by a disinterested party and

⁵See *Merrill v. Dawson, Hempst.* 563, Fed. Cas. No. 9,469.

⁶*Ex parte Humphrey, 2 Blatchf.* 228, Fed. Cas. No. 6,867.

⁹*Ante*, § 1072.

¹⁰*Perry v. Rubber T. W. Co.* 138 Fed. 836; *Butte, etc. Co. v. Montana, etc. Co.* 139 Fed. 843; *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 216, (C. C. A.)

¹¹*Ibid.*

Fed. Proc.—90.

¹²*Perry v. Rubber T. W. Co.* 138 Fed. 836; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

¹³See cases cited in foregoing notes.

¹⁴*Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521. See *ante*, § 1072. []

¹⁶See *Fowler v. Merrill*, 11 How. 375, 13 L. ed. 736.

¹⁷*Nichols v. Harris*, Fed. Cas. No. 10,243, 1 McA. Pat. Cas. 302.

the witnesses were cross-examined by the attorney for the opposite party.¹⁸ A statement by a notary acting as commissioner that "I am not of counsel or interested in any manner in this cause" has been held a sufficient compliance with the statute.¹⁹ Where a commission for the taking of depositions has been issued to a notary and they are taken by him, it is not necessary that he should attach his official seal to the certificate.²⁰

[g] Reasonable notice.

The chief features to be considered in determining whether a certain notice is or is not reasonable, are distance, number of witnesses, facility of communication and for obtaining proper representation.⁵ If the heading of the notice, while not technically correct is substantially so, the notice is sufficient.⁶ Where the notice fails to state the names of the witnesses, if it is accepted by the attorney for the adverse party, it is sufficient.⁷ A notice cannot be objected to on the ground that it designates a different place of examination than the one actually used where all the parties were present at the examination, either in person or by attorney.⁸ Failure of the notice to state the reasons for taking the deposition has been held to be unobjectionable.⁹ But a notice that three depositions were to be taken in three different cities on the same day was held to be unreasonable, and was therefore suppressed.¹⁰ And where the notice is unreasonable and irregular the fact that the opposing attorney endeavored as best he could to cross-examine, does not waive the irregularity.¹¹ Cross-examination, without protest however, and silence until the death of the witness operates as such a waiver.¹²

[h] Service on adverse party or his attorney.

While it has been held that notice cannot be served by leaving a copy thereof at the residence of the adverse party¹⁶ the serving of notice on some of the adverse parties and leaving a copy of the notice at the residence of another, has been held sufficient service.¹⁷ But no attorney is obliged to receive notice while attending on court and hence a notice so served has been held invalid, which if attended to, would make it impossible for the attorney to be present on the day the court commences.¹⁸

¹⁸Stewart v. Townsend, 41 Fed. 121.

¹⁹American, etc. Bank v Spokane, etc. Bank 82 Fed. 961, 27 C. C. A. 274.

²⁰Brown v. Ellis, 103 Fed. 834.

⁵American, etc. Bank v. Spokane, etc. Bank, 82 Fed. 961, 27 C. C. A. 274.

⁶Gormley v. Bunyan, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

⁷Sage v. Tauszky, 6 Cent. L. J. 7, Fed. Cas. No. 12,214.

⁸Gartside Coal Co. v. Maxwell, 20 Fed. 187.

⁹Sage v. Tauszky, 6 Cent. L. J. 21, Fed. Cas. No. 12,214; United States v. Louisville R. Co. 18 Fed. 481. But see Harris v. Wall, 7 How. 705, 12 L. ed. 879.

¹⁰Uhle v. Burnham, 44 Fed. 729.

¹¹Uhle v. Burnham, 44 Fed. 729.

¹²Shutte v. Thompson, 15 Wall. 151, 21 L. ed. 123.

¹⁶Carrington v. Stimson, 1 Curt. 437, Fed. Cas. No. 2,450.

¹⁷Merrill v. Dawson, Hempst. 563, Fed. Cas. No. 9,469.

¹⁸Bell v. Nimmon, 4 McLean, 539, Fed. Cas. No. 1,259.

Although the authority of an attorney has been revoked service of notice on him has been held sufficient, where no other attorney has been appointed, since the authority of an attorney to accept notice cannot be revoked until another attorney has been appointed in his place.¹⁹

[i] Compelling attendance of witness.

By this section the right is given to a party absolutely, to take testimony in the manner prescribed.⁴ Application for a subpoena must be made to a clerk of the Federal court in the district where the witness is to be examined,⁵ who is said to have the right to issue it without the court's order.⁶ The section also authorizes the clerk on order of the court to issue a subpoena duces tecum for the production of documents,⁷ but the right of the clerk to issue such subpoena without such order has been denied.⁸ In the southern district of New York an affidavit showing the bona fides of the application for the subpoena should also be filed.⁹ Upon due proof of service of a subpoena upon a witness requiring his attendance before a commissioner upon an examination *de bene esse* and the certificate of the commissioner that the witness did not attend, it is proper that an attachment should issue therefor.¹⁰ Attachment may also issue where the witness refuses to answer, but it must first appear that the commissioner has jurisdiction in the matter, that the witness is the proper subject of a *de bene esse* examination,¹¹ and that he was called upon to testify as to facts material and relevant to the issue.¹² Where, however, a witness has been examined in chief by the party at whose instance the depositions were taken, and an adjournment is had such party cannot withdraw the proceedings and an order will be granted for an attachment to compel the witness to attend upon cross-examination.¹³

§ 1762. Mode of taking depositions *de bene esse*.

Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined.^{[a]-[b]} His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the mag-

¹⁹United States Life Ins. Co. v. Ross, 102 Fed. 722, 42 C. C. A. 601.

⁴Henning v. Boyle, 112 Fed. 397; Davis v. Davis, 90 Fed. 791.

⁵Henning v. Boyle, 112 Fed. 397.

⁶Ibid.

⁷Crocker-Wheeler Co. v. Bullock, 134 Fed. 242; Dancel v. Goodyear Shoe Co. 128 Fed. 753; Davis v. Davis, 90 Fed. 791; Lowrey v. Kusworm, 66 Fed. 539; United States v. Tilden, 10 Ben. 566, Fed. Cas. No. 16,522.

⁸Dancel v. Goodyear Shoe Co. 128 Fed. 753.

⁹Henning v. Boyle, 112 Fed. 398.

¹⁰Ex parte Humphery, 2 Blatchf. 228, Fed. Cas. No. 6,867.

¹¹Ex parte Peck, 3 Blatchf. 113, Fed. Cas. No. 10,885. See Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

¹²In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563; Ex parte Peck, 3 Blatchf. 113, Fed. Cas. No. 10,885.

¹³In re Rindskopf, 24 Fed. 542, 23 Blatchf. 302.

istrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.^[c]

R. S. § 864, as amended act May 23, 1900, c. 541, 31 Stat. 182, U. S. Comp. Stat. 1901, p. 663.

[a] Deposition where taken.

There is no provision that the deposition de bene esse must be taken at the place of residence of the witness and such a limitation would be unjust. The deposition may be taken at any place where the witness is found and served with subpoena.¹⁶

[b] Deponent sworn and examined.

Strict compliance with this provision has been required. The witness must be carefully examined and must be sworn to testify the whole truth on the entire subject matter of the deposition, and not the whole truth in response to each of the interrogatories propounded to him.¹⁷ Where the witness was affirmed to testify the truth concerning all the matters touching which he should be questioned, the deposition was suppressed.¹⁸ Likewise where the witness takes oath to testify to "the truth" merely, it has been held insufficient.¹⁹ There is no particular form of oath required, and the statutory form used in the place where the witness is examined, if there be any, is the form to be used unless the deponent expresses conscientious scruples respecting that form.²⁰

[c] Procedure prior to amendment.

Prior to the amendment of 1900 the second sentence of the section read as follows: "His testimony shall be reduced to writing by the magistrate taking the deposition or by himself in the magistrate's presence, and by no other person, and shall after it has been reduced to writing, be subscribed by the deponent." In cases arising under the section in that form it was held that a deposition taken under the section could not be read unless the magistrate certified that it had been reduced to writing either by himself or by the witness in his presence.¹ And where there was no certificate by the magistrate that he had reduced the testimony to writing himself or that the witness had done it in his presence the omission was held to be fatal.² So also it was held that even where the testimony having been

¹⁶Blood v. Morrin, 140 Fed. 918.

¹⁷Wilson, etc. Co. v. Jackson, 1 Hughes, 295, Fed. Cas. No. 17,853.

¹⁸Garrett v. Woodward, 2 Cranch, C. C. 190, Fed. Cas. No. 5,253.

¹⁹Rainer v. Haynes, Hempst. 689, Fed. Cas. No. 11,536. See also Shutte v. Thompson, 15 Wall. 151, 21 L. ed. 123.

²⁰Wilson, etc. Co. v. Jackson, 1 Hughes, 295, Fed. Cas. No. 17,853.

¹Donahue v. Roberts, 19 Fed. 863;

Bell v. Morrison, 1 Pet. 351, 7 L. ed. 175; Ranier v. Haynes, Hempst. 689, Fed. Cas. No. 11,536; Marstin v. McRae, Hempst. 688, Fed. Cas. No. 9,141; Blake v. Smith, Fed. Cas. No. 1,502.

²Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29.

taken by a third party was read over and subscribed to by the witness in the presence of the magistrate, the statute had not been complied with.³

§ 1763. Order for production of books and writings in actions at law.

In the trial of actions at law,^[a] the courts of the United States may, on motion and due notice thereof,^[b] require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.^{[c]-[e]} If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.^[f]

R. S. § 724, U. S. Comp. Stat. 1901, p. 583.

[a] Section applicable only to actions at law.

The above section was carried forward into the Revised Statutes from the judiciary act of 1789.⁴ Its purpose and effect are to give to courts of law the power of courts of equity in the matter of requiring the production of documents, without the formality of going into a court of equity with a bill of discovery in aid of an action at law.⁵ A party thus has two remedies open to him, a bill of discovery in equity and an order to produce under this section, and if he chooses to go to the expense of both the court cannot deprive him of one of them unless it can clearly see that the other has been effectual, and that further proceedings might tend to harass the other party.⁶ The power given by the section is limited precisely to that power which the court of equity has.⁷ So the production of documents will not be ordered merely to gratify curiosity, or to enable one party to make undue inquisition into the affairs of another.⁸ Nor will the court extend discovery under the section beyond the legitimate requirements of the case to be aided thereby.⁹ The procedure of the Federal courts of equity is not affected by this section, they being governed by the equity rules

³Brown v. Ellis, 103 Fed. 834. See also, Moller v. United States, 57 Fed. 490, 6 C. C. A. 459; In re Thomas, 35 Fed. 822.

⁴Act Sept. 24, 1789, c. 20, § 15, 1 Stat. 82.

⁵Owyhee Land Co. v. Tantphans, 109 Fed. 547, 48 C. C. A. 535; Ryder v. Bateman, 93 Fed. 31; Gregory v. Chicago, etc. R. Co. 10 Fed. 529, 3 McCrary, 374; Hyltons Lessees v. Brown, 1 Wash. C. C. 298, Fed. Cas. No. 6,981. See especially Cassatt v.

Mitchell C. & C. Co. 150 Fed. 32 (C. C. A.)

⁶Iasigi v. Brown, 1 Curt. 401, Fed. Cas. No. 6,993; Paine v. Warren, 33 Fed. 357.

⁷Ryder v. Bateman, 93 Fed. 31; Boyd v. United States, 116 U. S. 631, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. See also Finch v. Rikeman, 2 Blatchf. 301, Fed. Cas. No. 4,788.

⁸Victor G. Bloede Co. v. Bancroft Co. 98 Fed. 175.

⁹Idem.

promulgated by the Supreme Court and in cases where such rules do not apply, by the practice of the English high court of chancery.¹⁰

The section relates only to suits at law¹¹ and a suit in rem has been held not to be within its provisions.¹²

[b] Motion and due notice thereof.

The practice is for the party requiring the papers, to make a motion for a rule upon the opposite party requiring the production of the books or papers desired. The motion should describe the books and papers with as much certainty as possible,¹⁵ and should further state that according to the mover's best knowledge the books and papers called for will tend to prove the issue in his favor. It should state some facts which the documents will tend to prove, pertinent to the issue. The proof of the allegations should be verified by affidavit.¹⁶ An ex parte affidavit has been held sufficient.¹⁷

Notice must be given the party required to produce the books,²⁰ or his attorney,¹ so that he may have time to appear and show cause why the rule should not be made. And on receiving such notice that party may show by affidavit that he has no such documents, or advance any other reason why the motion should not be granted.² The notice must be reasonable, and if not reasonable, the trial may be postponed to give the party an opportunity to procure the documents.³ The section does not, however, require the formalities of a bill of discovery in chancery, and a mere notice to the opposite party of the time and place of the application with a plain designation of the documents sought for, will be sufficient.⁴

[c] Disposal of motion—production of documents.

Where issue is made upon the motion the court will hear proof and grant or refuse the motion according to the nature of the case.⁸ The court will not act favorably on any application which is ambiguous and does not clearly conform to the requirements of the section.⁹ The section should not, however, be construed so narrowly as to authorize a motion to produce, only when the documents have been described in the pleadings.¹⁰

¹⁰Ryder v. Bateman, 9 3Fed. 31.
See ante, §§ 1036, et seq.

¹¹Havemeyer, etc. Co. v. Compania, etc. Espanola, 43 Fed. 90; Bischoffsheim v. Brown, 29 Fed. 341.

¹²United States v. Twenty-eight Packages, Gilp. 306, Fed. Cas. No. 16,561. But see United States v. Barrels, 10 Int. Rev. Rec. 205.

¹⁵Lowenstein v. Carey, 12 Fed. 811; Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167.

¹⁶Lowenstein v. Carey, 12 Fed. 811.

¹⁷United States v. Twenty-eight Packages, Gilp. 306, Fed. Cas. No. 16,561.

²⁰Maye v. Carbery, 2 Cr. C. C. 336, Fed. Cas. No. 9,339; Bas v. Steele, 3 Wash. C. C. 391, Fed. Cas. No. 1,088.

¹Geyger v. Geyger, 2 Dall. 332, 1 L. ed. 403; Lowenstein v. Carey, 12 Fed. 811.

²Lowenstein v. Carey, 12 Fed. 811.
³Geyger v. Geyger, 2 Dall. 332, 1 L. ed. 403.

⁴Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167.

⁸Lowenstein v. Carey, 12 Fed. 811.

⁹Victor G. Bloede Co. v. Bancroft

Co. 110 Fed. 76.
¹⁰Paine v. Warren, 33 Fed. 357.

The motion has been refused where the affidavit accompanying the motion merely states that the affiant "believes" the production of the papers will tend to prove the issue without stating the grounds for such belief.¹¹ Where the books sought to be produced contain entries with which the party applying has no concern, and which he ought not to see, the order, while requiring their production, may provide for the attendance of some representative of the opposite party during the examination thereof.¹² Entries which it is contended are not relevant and should not be disclosed, may be inspected by the clerk, and if his decision is not satisfactory to either of the parties application to review it may be made summarily to the judge at chambers.¹³ Only parties to the cause may be compelled to produce under this section.¹⁴

[d] — discovery by or against United States.

While a bill of discovery will not lie against the United States an order has been granted under this section to compel the production by the United States of the returns of the weights of certain goods in an action brought by the United States to recover duties alleged to be due.¹⁵ But in an action to recover penalties for false marking of certain articles as patented, the defendant cannot be compelled to produce his books to show the number of penalties alleged to have been incurred, since such action is penal, and the section expressly limits its application to cases where the party might be compelled to produce the documents under "the ordinary rules of proceeding in chancery," hence since a bill of discovery will not lie in a case which involves a penalty or forfeiture, the documents cannot be obtained under the provisions of this section.¹⁷

[e] — production of documents before or at trial.

The section appears to require a production of documents "in the trial," i. e. at the trial only, and not before,¹⁸ though a contrary view has been taken in several nisi prius cases.¹ Since the act of 1892 permitting depositions in accordance with State laws,² it has been argued that a party may secure the production of books before trial where the State law so authorizes in the taking of depositions.³

[f] Remedy in case of noncompliance.

In case of noncompliance by a party with the order of the court, the other party, in the discretion of the court, may obtain either a judgment of nonsuit or judgment by default, as the case may be, for the court can-

¹¹Casparry v. Carter, 84 Fed. 416. 1,088; Iasigi v. Brown, 1 Curt. 401,

¹²Gray v. Schneider, 119 Fed. 474. Fed. Cas. No. 6,993; United States v.

¹³Gray v. Schneider, 119 Fed. 474. National L. Co. 75 Fed. 94.

¹⁴Cassatt v. Mitchell C. & C. Co. 150 Fed. 32 (C. C. A.) ¹Gray v. Schneider, 119 Fed. 474;

¹⁵United States v. Youngs, 10 Ben. 264, Fed. Cas. No. 16,783. Bloede Co. v. Bancroft Co. 98 Fed.

¹⁷Newgold v. American, etc. Co. 108 Fed. 341. 175; Henszey v. Langdon, etc. Co. 80

¹⁸Cassatt v. Mitchell C. & C. Co. 150 Fed. 32 (C. C. A.); Bas v. Steele, 67 Fed. 18; Exchange, etc. Bank v.

3 Wash. C. C. 381, Fed. as. No. Tuthill, etc. Co. 34 Fed. 769.

²See post § 1776.

³Gray v. Schneider, 119 Fed. 474.

not compel jurisdiction by attachment.⁷ In order to obtain such nonsuit or judgment by default there must be notice of the motion for the order given to the party who is to produce the documents, followed by the order which has been disobeyed.⁸

§ 1764. Transmission to court of deposition de bene esse.

Every deposition taken under the two preceding sections shall be retained by the magistrate taking it until he delivers it with his own hand into the court for which it is taken;^[a] or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court,^[b] and remain under his seal until opened in court.^[c] But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.^[d]

R. S. § 865, U. S. Comp. Stat. 1901, p. 663.

[a] Deposition may be delivered by magistrate personally.

The section was originally enacted in 1789.¹⁰ Where the magistrate delivers the deposition with his own hand into the court there is no need for the certificate to accompany it.¹¹

[b] — or may be sealed and directed to court.

The deposition when sent to court must be sealed up together with notice and certificate of reasons, and when not so sealed it will be refused.¹⁴ A deposition has been held sealed up within the meaning of the section where the envelope was sealed twice and the name of the magistrate written over each seal.¹⁵ Where the deposition is sealed up and the usual indorsements made, the fact that the officer failed to certify that he had so sealed it and placed it in the postoffice is immaterial.¹⁶ While the seal is necessary the form of the seal is immaterial as long as the person has adopted it as his own.¹⁷ But a deposition taken before a commissioner who was also clerk of the court, within the knowledge of the

⁷Bloede Co. v. Bancroft, etc. Co. 110 Fed. 76.

⁸Owyhee Land, etc. Co. v. Tautphaus, 109 Fed. 547, 48 C. C. A. 535; Bank of United States v. Kurtz, 2 Cr. C. C. 342, Fed. Cas. No. 920; Thompson v. Selden, 20 How. 194, 15 L. ed. 1001.

¹⁰Act Sept. 24, 1789, c. 20, 1 Stat. 88.

¹¹United States v. Tilden, 10 Ben. 170, Fed. Cas. No. 16,520.

¹⁴Shankwiker v. Reading, 4 McClean, 240, Fed. Cas. No. 12,704.

¹⁵Thorp v. Orr, 2 Cranch C. C. 335, Fed. Cas. No. 14,006.

¹⁶Egbert v. Citizens Ins. Co. 7 Fed. 47, 2 McCrary, 386.

¹⁷In re Thomas, 35 Fed. 337.

proctor of the adverse party, has been held sufficient without seal.¹⁸ The deposition must be returned to court although the fact that it is addressed not to the court but to the judges thereof, is immaterial.¹⁹ This return cannot be waived by the parties and an agreement that "all objections as to the manner and form of taking are hereby waived" does not dispense with the necessity of a return in all respects as provided.²⁰ A deposition which has neither been delivered personally to the court nor signed and sealed, as required by this section cannot be considered as evidence.¹

[c] Deposition to remain under magistrates seal until opened in court.

The party who initiated the proceedings has no right to the custody⁴ or the suppression of the deposition.⁵ Nor has such person the right to demand that the magistrate withhold it;⁶ and if the magistrate does so the court will grant an order for its return.⁷ There seems to be no objection to opening the deposition out of court if the consent of the opposite party is obtained. Such consent should however be manifested in writing.⁸ The term "opened in court" does not necessarily mean opened on the trial of the case, and hence the depositions may be opened before trial, on an order of the court and over the objection of one of the parties.⁹

[d] Deposition when not to be used.

The section provides that the deposition cannot be used when it appears to the court that the statutory reasons for taking it do not exist. Thus it is established that depositions cannot be used in any case, at the trial if the presence of the witness himself is actually attainable and the party offering the deposition knew it or ought to have known it.¹³ The presumption however is that, where the witness lives more than one hundred miles from the place of trial when the deposition was taken, he continues to live there at the time of trial.¹⁴ The presumption may be overcome by proof from the other side, and if it is, and the party has knowledge of his power to get the witness in time to enable him to secure an attendance at the trial, he must do so and the deposition will be excluded.¹⁵ But

¹⁸Nelson v. Woodruff, 1 Black, 156, 17 L. ed. 97.

¹⁹Thorp v. Orr. 2 Cranch C. C. 335, Fed. Cas. No. 14,006.

²⁰Livingstone v. Pratt, Brown, Adm. 66, Fed. Cas. No. 8,417.

¹The Saranac, 132 Fed. 942.

⁴Livingstone v. Pratt, Brown, Adm. 66, Fed. Cas. No. 8,417.

⁵In re Rindskopf, 24 Fed. 542, 23 Blatchf. 302.

⁶Grand Haven, etc. Bank v. Forest, 44 Fed. 246.

⁷Idem.

⁸The Roscius, Brown Adm. 442, Fed. Cas. No. 12,042.

⁹United States v. Tilden, 10 Ben. 170, Fed. Cas. No. 16,520.

¹³Whitford v. Clark Co. 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306. See also Texas, etc. Ry. v. Reagan, 118 Fed. 817, 55 C. C. A. 427.

¹⁴Whitford v. Clark Co. 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; Texas, etc. Ry. v. Reagan, 118 Fed. 817, 55 C. C. A. 427; Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 8 L. ed. 243.

¹⁵Whitford v. Clark Co. 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306. See also Russell v. Ashley, Hempst. 546, Fed. Cas. No. 12,150.

where the witness does not live at a greater distance than one hundred miles it is incumbent on the party for whom the deposition was taken to show at the trial that the disability of the witness still continues.¹⁶

§ 1765. Deposition by *dedimus potestatem* and in *perpetuam*.

In any case^[a] where it is necessary,^[b] in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage;^[c] and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five,¹ shall not apply to any deposition to be taken under the authority of this section.

R. S. § 866, U. S. Comp. Stat. 1901, p. 663.

[a] Scope of section.

Where the testimony can be taken by a deposition *de bene esse* a *dedimus potestatem* will not be granted,² since the former is a much more convenient method of taking proof³ and the provisions as to depositions *de bene esse* and the transmission thereof to court, are not in any way applicable to depositions taken under this section.⁴ The words "in any case" do not mean in any case where the party may desire the testimony of a foreign witness, but in any case of which the court has jurisdiction, hence the District court has been held to be without authority to issue a commission under this section in an investigation under the Chinese Exclusion acts.⁵ But commissions under this section will be granted in criminal as well as civil cases.⁶ It was formerly held that the mode of executing commissions for the taking of depositions out of a Federal court was governed by this section to the exclusion of State statutes.⁷ Under the act of 1892 however depositions according to State usage are now authorized.⁸

¹⁶*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. ed. 243.

¹*Ante*, §§ 1761-1763.

²*Turner v. Shackman*, 27 Fed. 183.

³*Henning v. Boyle*, 112 Fed. 397.

⁴*Jones v. Oregon, etc. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486. See also, *Giles v. Paxson*, 36 Fed. 882.

⁵*United States v. Hom Hing*, 48 Fed. 635.

⁶*United States v. Cameron*, 15 Fed. 794, 5 McCrary, 93; *United States v. Wilder*, 14 Fed. 393, 4 Woods, 475.

⁷*United States v. Pings*, 4 Fed. 714; *Turner v. Shackman*, 27 Fed.

183. But see *contra*, *United States v. Cameron*, 15 Fed. 794, 5 McCrary, 93; *Jones v. Oregon, etc. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486.

⁸See *post*, § 1776.

[b] Necessity must be shown.

The necessity for the issuance of a *dedimus potestatem* must be shown.⁹ and it will not be granted where the object of the petition is merely to see what the witness will testify before he is put on the witness stand.¹⁰ So also a bill to perpetuate testimony will not be sustained if it be possible that the matter in question can be made the subject of immediate investigations by the party who filed the bills.¹¹

[c] Taken according to common usage.

The phrase "according to common usage" means according to the existing practice whether at law or equity, and the usage referred to is the common usage at the time of the revision of the United States statutes in 1874.¹² In districts where there is no established practice it is competent and proper to refer to the usage in other districts or to the usage of the State.¹³ But there is nothing in the phrase "common usage" which imports that the Federal courts in any of the States must adopt all subsequent regulations enacted from time to time by State legislatures.¹⁴ The act of 1892¹⁵ did not authorize this, but merely gave legislative sanction to the following of the State practice by authorizing that practice in addition to the former method.¹⁶

Since this section has no application to the statutory provisions as to the taking and transmitting to court of depositions *de bene esse*, it is not necessary under this section that the return of the commission should show when the examination was taken nor who reduced it to writing; nor is it material whether the witness was "cautioned" before being sworn, nor that the return should show anything more than that he was duly sworn and examined upon oath duly administered.¹⁷ All objections of a formal character and such as might have been obviated if urged on the examination of the witness must be raised on such examination, or on motion to suppress the deposition.¹⁸ A deposition taken without leave of court will be rejected.¹⁹

§ 1766. When deposition in perpetuam admissible.

Any court of the United States may, in its discretion, admit in evidence in any cause before it, any deposition taken in perpetuam rei memoriam, which would be so admissible in a court of

⁹*Randall v. Venable*, 17 Fed. 162; *United States v. Cameron*, 15 Fed. 794, 5 *McCrary*, 93.

¹⁰*Turner v. Shackman*, 27 Fed. 183; *Flower v. MacGinniss*, 112 Fed. 377, 50 C. C. A. 291.

¹¹*New York, etc. Co. v. New York, etc. Co.* 9 Fed. 578, 20 *Blatchf.* 174.

¹²*United States v. Fifty Boxes, etc.* 92 Fed. 601; and see *Bischoffsheim v. Baltzer*, 20 *Blatchf.* 229, 10 Fed. 1.

¹³*United States v. Fifty Boxes, etc.* 92 Fed. 601.

¹⁴*Idem.*

¹⁵*Post*, § 1776.

¹⁶*United States v. Fifty Boxes, etc.* 92 Fed. 604.

¹⁷*Jones v. Oregon, etc. R. Co.* 3 *Sawyer*, 523, Fed. Cas. No. 7,486.

¹⁸*York Co. v. Illinois, etc. R. Co.* 3 *Wall.* 107, 18 L. ed. 170.

¹⁹*Hoyt v. Hammekin*, 14 *How.* 346, 14 L. ed. 449.

the State wherein such cause is pending, according to the laws thereof.

R. S. § 867, U. S. Comp. Stat. 1901, p. 664.

The section was carried into the Revised Statutes from an act of 1812.³ Its provision is intended to permit the Federal courts to admit in evidence testimony perpetuated according to State laws and it does not relate to testimony perpetuated by direction of the circuit court⁴ although it does not exclude it.⁵ Where the deposition has not been taken in accordance with the State laws it will be excluded.⁶

§ 1767. Taking deposition under *dedimus*—compelling testimony.

When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court.

R. S. § 868, U. S. Comp. Stat. 1901, p. 664.

The section was originally enacted in 1827.⁸ It was intended to authorize the procuring by a commission of any evidence procurable on trial.⁹

§ 1768. Compelling production of books, etc. under *dedimus*.

When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding a witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper

³Act Feb. 20, 1812, c. 25, 2 Stat. 682.

⁴See ante, § 1765.

⁵New York, etc. Co. v. New York, etc. Co. 9 Fed. 578, 20 Blatchf. 174.

⁶Gould v. Gould, 3 Story 516, Fed. Cas. No. 5,637.

⁸Act Jan. 24, 1827, c. 4, § 1, 4

Stat. 197.

⁹In re Shephard, 3 Fed. 12, 18 Blatchf. 225.

or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.

R. S. § 869, U. S. Comp. Stat. 1901, p. 665.

The section was originally enacted in 1827.¹² It applies to cases where depositions *de bene esse* are taken under R. S. § 863¹³ or depositions in perpetuam, and under a *dedimus potestatem* by R. S. § 866.¹⁴ It does not however apply to testimony taken under the general powers of a court of equity and in the mode prescribed by the equity rules.¹⁵ The function of a subpoena *duces tecum* is confined to the securing of documents and books¹⁶ hence under it a witness cannot be compelled to produce a piece of metal in the form of a model,¹⁷ nor patterns for a stove.¹⁸

§ 1769. — rights of witness as to distance and fees.

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his

¹²Act Jan. 24, 1827, c. 4, 4 Stat. 199.

¹³See ante, § 1761.

¹⁴Ante, § 1765.

¹⁵Johnson, etc. Co. v. Steel Co. 48 Fed. 191.

¹⁶In re Shephard, 3 Fed. 12, 18 Blatchf. 225.

¹⁷Johnson, etc. R. Co. v. Steel Co. 48 Fed. 191.

¹⁸In re Shephard, 3 Fed. 12, 18 Blatchf. 225.

residence, to give deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpoena.

R. S. § 870, U. S. Comp. Stat. 1901, p. 665.

The above section was originally enacted in 1827.¹ The provisions respecting witness fees are contained in an earlier chapter of this Code.²

§ 1770. Depositions in District of Columbia for suits elsewhere.

When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or Territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said district therein specified.

R. S. § 871, U. S. Comp. Stat. 1901, p. 665.

The section was carried into the Revised Statutes from an act of 1869.³

§ 1771. — when summons to witness will issue.

When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court. First. That any person within said district is a material witness for either party in a suit pending in any State or Territorial or foreign court. Second. That no commission nor notice to take the testimony of such witness has been issued or given; and, Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before

¹Act Jan. 24, 1827, c. 4, §§ 1, 2, ³Act Mar. 3, 1869, c. 128, § 1, 15
⁴Stat. 197, 199. Stat. 324.

²Ante, § 725, et seq.

him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit.

R. S. § 872, U. S. Comp. Stat. 1901, p. 666.

The above section was originally enacted in 1869.⁶

§ 1772. — manner of taking and transmitting deposition—penalty for refusal to testify.

Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.

R. S. § 873, U. S. Comp. Stat. 1901, p. 666.

The above section was originally enacted in 1869.⁸

§ 1773. — fees of witnesses.

Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

R. S. § 874, U. S. Comp. Stat. 1901, p. 666.

§ 1774. Letters rogatory from and to foreign countries.

When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court

⁶Act Mar. 3, 1869, c. 128, § 2, ⁸Act Mar. 3, 1869, c. 128, § 3, 15
15 Stat. 325. Stat. 325.

from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.

R. S. § 875, as amended 1877, U. S. Comp. Stat. 1901, p. 667.

The last sentence of the above section was added by the act of 1877,¹⁰ the remainder of the section having been first enacted in 1863.¹¹ Provisions relating to the taking of testimony of witnesses residing in the United States for use in foreign countries are set forth elsewhere.¹² The section only provides for the procedure when letters rogatory are addressed and commissioners are appointed and it does not extend to cases in which examination of witnesses will be ordered.¹³

§ 1775. Notaries may take depositions, etc., for use in Federal courts.

Notaries public of the several States, Territories, and the District of Columbia be and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do.

Act Aug. 15, 1876, c. 304, 19 Stat. 206, U. S. Comp. Stat. 1901, p. 663.

§ 1776. Depositions may be taken according to State law.

In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or

¹⁰Act Feb. 27, 1877, c. 69, 19 Stat. 241.

¹²See ante, §§ 1750-1753.

¹¹Act Mar. 3, 1863, c. 95, 12 Stat. 306.
¹³In re Letters Rogatory, 36 Fed. 770.

testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held.

Act Mar. 9, 1892, c. 14, 27 Stat. 7, U. S. Comp. Stat. 1901, p. 664.

The word "mode" in the above provision refers merely to the manner of taking depositions, and the section therefore does not give the Federal courts discretion to take depositions not authorized by Federal law. It merely permits them in their discretion to follow the Federal practice in the manner of taking, or that prescribed by the State law.¹⁶ Thus a State law providing for the issuance of a commission by the clerk with interrogatories attached may be followed in the Federal court.¹⁷

A deposition taken for use in a State court, in accordance with the State practice may be used on the removal of the cause to a Federal court where it appears that since the taking of the deposition the deponent has died.¹⁸ But depositions so taken cannot be received on removal to Federal court, where the witnesses are accessible and within one hundred miles of the place of trial.¹⁹

§ 1777. Copies of department records and papers as evidence.

Copies of any books, records, papers, or documents in any of the executive departments,^[a] authenticated under the seals of such departments,^[b] respectively, shall be admitted in evidence equally with the originals thereof.

R. S. § 882, U. S. Comp. Stat. 1901, p. 669.

[a] Copies of books, documents, etc.

The words documents and papers used in this section cannot be held to mean every document or paper on file but only such as were made by an officer or agent of the government in the course of his official duty.³ A copy of a bond certified under this section is not evidence of the execution of such bond where the same is denied but it must be certified under R. S. § 886⁴ by the register, subject to call for the production of the original.⁵

[b] Authentication.

Where the commissioner of pensions certified to a record in his office and the acting Secretary of the Interior certified as to the former official

¹⁶Hanks v. Dental, Asso. v. Tooth Crown Co. 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700; Hartman v. Frenaughty, 139 Fed. 887; National, etc. Co. v. Leland, 94 Fed. 502, 37 C. C. A. 372; Seely v. Kansas City, etc. Co. 71 Fed. 554; Shellabarger v. Oliver, 64 Fed. 306; United States v. Fifty Boxes, 92 Fed. 601. A contrary view has been upheld, see Smith v. Northern Pac. Ry. 110 Fed. 343; but the Supreme Court decision

above cited would seem to settle the question.

¹⁷Carrara, etc. Co. v. Carrarra Paint Co. 137 Fed. 319.

¹⁸United States Life Ins. Co. v. Ross, 102 Fed. 722, 42 C. C. A. 601.

¹⁹Texas, etc. R. Co. v. Wilder, 92 Fed. 953, 35 C. C. A. 105.

³Blocks Case, 7 Ct. Cl. 406.

⁴See post, § 1782.

⁵United States v. Humason, 8 Fed. 71, 7 Sawy. 252.

character it was held that the section had been complied with, since the office of Pension Commissioner is part of the Department of the Interior.⁶

§ 1778. Copies of records in office of Solicitor of Treasury.

Copies of any documents, records, books, or papers in the office of the solicitor of the treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals.

R. S. § 883, U. S. Comp. Stat. 1901, p. 669.

The section was carried into the Revised Statutes from an act of 1849.⁸

§ 1779. Copies of papers, etc., in office of Indian Commissioner.

Copies of any public documents, records, books, maps, or papers belonging to or on the files of said office [i. e., of the Commissioner of Indian Affairs] authenticated by the seal [provided for by this act] and certified by the Commissioner thereof, or by such officer as may, for the time being, be acting as or for such Commissioner, shall be evidence equally with the originals thereof.

Part of § 3, act July 26, 1892, c. 256, 27 Stat. 272, U. S. Comp. Stat. 1901, p. 263.

§ 1780. Comptroller of Currency's instruments, etc., and copies of records.

Every certificate, assignment, and conveyance executed by the comptroller of the currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

R. S. § 884, U. S. Comp. Stat. 1901, p. 669.

The section was originally enacted in 1864.¹⁰

§ 1781. Organization certificates of national banks as evidence.

Copies of the organization certificate of any national banking association, duly certified by the comptroller of the currency, and authenticated by his seal of office, shall be evidence in all courts and

⁶Ballew v. United States, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263.

⁸Act Feb. 22, 1849, c. 61, 9 Stat. 347.

¹⁰Act June 3, 1864, c. 106, 13 Stat. 100.

places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.

R. S. § 885, U. S. Comp. Stat. 1901, p. 670.

In an action brought against a stockholder of a bank on his liability as such, the comptroller's certificate is conclusive as to the completeness of the organization of the bank.¹¹

§ 1782. Transcripts from books, etc., of Treasury as evidence.

When suit is brought^[a] in any case of delinquency of a revenue officer, or other person accountable for public money,^[b] a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence,^[c] and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: Provided, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads non est factum, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.

R. S. § 886, U. S. Comp. Stat. 1901, p. 670.

[a] General application of section.

The legislature has power to establish new rules of evidence in derogation of the common law by making transcripts from the departments

¹¹Casey v. Galli, 94 U. S. 673, 24 L. ed. 168.

at Washington evidence against public debtors;¹⁵ and the provisions of this section as to the admission of authenticated copies is general and applies to all cases where the evidence is required. It is founded on the prudent precaution to guard against the loss of the original document.¹⁶ The section applies to a proceeding against the surety as well as one against the delinquent principal.¹⁷

[b] "Accountable for public money."

Since it is the duty of an Indian agent to receive and disburse public moneys he is a person accountable for public money within the meaning of the section.¹⁸ But in an action brought against the superintendent of a mint on his official bond, on the ground that he had not safely kept the money and bullion, a transcript was not allowed, such case not being within the section.²⁰ A similar decision was reached on a suit brought against a party for money alleged to have been paid him by mistake by one of the governments disbursing officers.¹

[c] Nature and authentication of transcript.

The statement presented by the transcript should be complete in itself, and should give both sides of an account as the same stands on the books, but it is not necessary that every account with an individual and all of every account shall be transcribed as a condition of the admissibility of one account.⁴ The transcript must however be more than a mere naked balance or gross amount due.⁵ A transcript setting forth the debit side of a charge, against a government officer, for property received but not showing of what the property consisted nor how its value was ascertained has been held inadmissible, although there was attached thereto, a paper describing the property item by item and setting forth the values, but not professing to be a transcript.⁶ The mode of authenticating transcripts from the departments at Washington as prescribed must be strictly pursued.⁸ It has been held that the transcripts are under this section made prima facie evidence of the facts stated therein, so far as the same are authorized by law.⁹

¹⁵United States v. Harrill, McAll. 243243, Fed. Cas. No. 15,310.

¹⁶United States v. Lent, 1 Paine 417, Fed. Cas. No. 15,593.

¹⁷Chadwick v. United States, 3 Fed. 750.

¹⁸United States v. Allen, 36 Fed. 174.

²⁰United States v. Bosbyshell, 73 Fed. 616.

¹United States v. Radowitz, 8 Reporter 263, Fed. Cas. No. 16,112.

⁴United States v. Gaussen, 19 Wall. 198, 22 L. ed. 41; see also Hoyt v. United States, 10 How. 109, 13 L. ed. 348; Gratiot v. United States, 15 Pet. 370, 10 L. ed. 771.

⁵United States v. Jones, 8 Pet. 383, 8 L. ed. 988; and see Gratiot v. United States, 15 Pet. 370, 10 L. ed. 771; Hoyt v. United States, 10 How. 109, 13 L. ed. 348.

⁶United States v. Smith, 35 Fed. 490.

⁸United States v. Harrill, McAll. 243, Fed. Cas. No. 15,310.

⁹Harvey v. United States, 97 Fed. 452, 38 C. C. A. 267; United States v. Eggleston, 4 Sawy. 199, Fed. Cas. No. 15,027; Bruce v. United States, 17 How. 437, 15 L. ed. 129; but see United States v. Ralston, 17 Fed. 895.

Under the provisions of the above section the certification is done by the Register or Auditors as the case may be, since the act of 1894 however the certification is done by the Secretary or Assistant Secretary of the Treasury.¹⁰ Since the transcripts are not conclusive evidence it has been held that if the defendant disputed any of the charges against him he could, by proper application to the court, supported by sufficient evidence, obtain the original vouchers on which he was charged, if necessary to his defense and to show that the debit against him was erroneous.¹¹

§ 1783. — how transcripts should be certified.

The transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in section eight hundred and eighty-six of the Revised Statutes shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the department.

§ 17, act July 31, 1894, c. 174, 28 Stat. 210, as amended act Mar. 2, 1895, c. 177, 28 Stat. 809, U. S. Comp. Stat. 1901, p. 671.

A certification of the transcript by the acting Secretary of the Treasury is sufficient.¹⁴

§ 1784. — transcripts in indictments for embezzling public moneys.

Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence for the purpose of showing a balance against such person to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section.

R. S. § 887, U. S. Comp. Stat. 1901, p. 671.

§ 1785. Copies of returns in returns office of Interior Department.

A copy of any return of a contract returned and filed in the returns office of the department of the interior, as provided by law, when certified by the clerk of said office to be full and complete, and when authenticated by the seal of the department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such

¹⁰See post, § 1783.

¹⁴Laffan v. United States, 122 Fed.

¹¹United States v. Bruce, 17 How. 334, 58 C. C. A. 495.
437, 15 L. ed. 129.

officer in making his return of any contract, as required by law, to said returns office.

R. S. § 888, U. S. Comp. Stat. 1901, p. 671.

The section was originally enacted in 1862.¹⁷

§ 1786. Copies of postoffice records as evidence against postmasters, etc.

Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account books of the post-office department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

R. S. § 889, U. S. Comp. Stat. 1901, p. 671.

The title of sixth auditor is changed by an act of 1894, to Auditor of the Postoffice Department.¹⁸ Transcripts of the quarterly reports duly certified are admissible as evidence,¹⁹ as are also duly certified transcripts of books of the United States Treasury Department showing the post-office accounts.²⁰ Such reports and accounts are however only prima facie evidence and subject to be met by other competent proof.¹ Quarterly reports duly certified as required by this section and signed by the postmaster but written by the assistant postmaster are properly admitted on an indictment of the latter for embezzlement.² The fact that transcripts of accounts duly certified fail to set forth credits claimed by the defendant but disallowed by the government does not affect their admissibility.³ And it is held that the transcript is good even where credits claimed and allowed are not set forth.⁴

¹⁷Act June 2, 1862, c. 93, § 4, 12 Stat. 412.

¹Idem.

¹⁸Act July 31, 1894, c. 174, § 3, U. S. Comp. Stat. p. 154.

²McBride v. United States, 101 Fed. 821, 42 C. C. A. 38.

¹⁹United States v. Snyder, 14 Fed. 554, 4 McCrary, 618.

³United States v. Hodge, 13 How.

²⁰United States v. Carlovitz, 80 Fed. 852, 26 C. C. A. 188.

⁴United States v. Harrill, 1 Mc-All. 243, Fed. Cas. No. 15,310.

§ 1787. What shall be sufficient evidence of demand on postmaster.

In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster General or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.

R. S. § 890, U. S. Comp. Stat. 1901, p. 672.

This section was carried into the Revised Statutes from an act of 1868.⁷

§ 1788. Copies and exemplifications of General Land office records.

Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record.

R. S. § 891, U. S. Comp. Stat. 1901, p. 672.

Where the records of a local land office were burned, a book prepared under the direction of the General Land Office Commissioner and transmitted by him to the register of the local land office was held to be admissible in evidence under this section as an official book, although not certified.⁸

⁷Act July 27, 1868, c. 246, § 19, 15 Stat. 107.

⁸Carr Land Co. v. United States, Tong, 108 U. S. 560, 27 L. ed. 811, 118 Fed. 821, 55 C. C. A. 433.

§ 1789. — duty of Commissioner of General Land Office regarding same.

The Commissioner of the General Land Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in the courts of justice.

R. S. § 2469, U. S. Comp. Stat. 1901, p. 1557.

§ 1790. — exemplifications by him as evidence.

Literal exemplification of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record.

R. S. § 2470 U. S. Comp. Stat. 1901 p. 1557.

The section was originally enacted in 1843.¹⁰ This provision is substantially the same as that of R. S. § 891.¹¹

§ 1791. Registers and receivers transcripts of Land Office records as evidence.

The transcripts thus furnished [i. e., by registers and receivers of land offices to applicants paying the prescribed fee] when duly certified to by them [i. e., by registers and receivers], shall be admitted as evidence in all courts of the United States and the Territories thereof, and before all officials authorized to receive evidence, with the same force and effect as the original records.

Act Mar. 22, 1904, c. 748, 33 Stat. 144, U. S. Comp. Stat. 1905, p. 313.

§ 1792. Original papers in Land Office as evidence.

Whenever the register of any United States land office shall be served with a subpoena duces tecum or other valid legal process requiring him to produce, in any United States court or in any court of record of any State, the original application for entry of public lands or the final proof of residence and cultivation or any other original papers on file in the general land office of the United States on which a patent to land has been issued or which furnish

¹⁰Act March 3, 1843, c. 95, § 1, 5 Stat. 627.

¹¹Ante. § 1788.

the basis for such patent, it shall be the duty of such register to at once notify the commissioner of the general land office of the service of such process, specifying the particular papers he is required to produce, and upon receipt of such notice from any register of a United States land office the Commissioner of the general land office shall at once transmit to such register the original papers specified in such notice, and which such register is required to produce, and to attach to such papers a certificate, under seal of his office, properly authenticating them as the original papers upon which patent was issued; and such papers so authenticated shall be received in evidence in all courts of the United States and in the several State courts of the States of the Union: Provided, That the Secretary of the Interior shall make rules and regulations to secure the return of such documents to the general land office, after use in evidence, without cost to the United States.

Act Apr. 19, 1904, c. 1398, 33 Stat. 186, U. S. Comp. Stat. 1905, p. 47.

§ 1793. Copies of General Land Office papers made by Recorder, as evidence.

Copies of any patents, records, books, or papers in the general land office authenticated by the seal and certified by the recorder of such office shall be evidence equally with the originals thereof to the same force and effect as when certified by the commissioner of said office.

Act Apr. 19, 1904, c. 1396, 33 Stat. 185, U. S. Comp. Stat. 1905, p. 163.

§ 1794. Copies of records, etc., of patent office.

Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof.

R. S. § 892, U. S. Comp. Stat. 1901, p. 673.

The section was originally enacted in 1870.¹⁵ It relates only to records, books, papers or drawings belonging to the Patent Office and letters patent.¹⁶ It is held that a certified copy of a patent office record of an assign-

¹⁵Act July 8, 1870, c. 230, § —, 16 Stat. 207.

¹⁶*Paine v. Trask*, 56 Fed. 233, 5 C. C. A. 497.

ment of a patent is *prima facie* evidence of the genuineness of the instrument.¹⁷ This holding however has been expressly disapproved on the ground that, since the law does not require an assignment of a patent to be put on record, such an assignment is not a record or paper "belonging to" the Patent Office, and that such a holding would open the door to fraud.¹⁸

§ 1795. — copies of foreign letters patent.

Copies of the specifications and drawings of foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent, and of the date and contents thereof.

R. S. § 893, U. S. Comp. Stat. 1901, p. 673.

This section was originally enacted in 1870.¹ A copy of a French patent certified by a director of the National Conservatory of Arts and Manufactures in France under the seal of that department and verified by the Minister of Agriculture and Commerce, was held to be sufficiently certified under the section, since the above Conservatory and its Commissioners correspond to the Patent Office and the Commissioner in the United States and the Minister of Agriculture and Commerce to the Secretary of the Interior.²

§ 1796. — printed copies of specifications and drawings of patents.

The printed copies of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerks' offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained.

R. S. § 894, U. S. Comp. Stat. 1901, p. 673.

The above section was originally part of a resolution of 1871.⁴

§ 1797. Copies of Patent Office trademark papers as evidence.

Written or printed copies of any records, books, papers, or draw-

¹⁷Standard, etc. Co. v. Crane, etc. 60 Fed. 1016, 9 C. C. A. 336; Paine Co. 76 Fed. 767, 22 C. C. A. 549; v. Trask, 56 Fed. 233, 5 C. C. A. Dederick v. Whitman, etc. Co. 26 Fed. 497.
¹⁸Act July 8, 1870, c. 230, § —, 16 Stat. 207.
¹National, etc. Box Co. v. American, etc. Pail Co. 55 Fed. 488; see also Parker v. Haworth, 4 McLean, 370, Fed. Cas. No. 10,738; Brooks v. Jenkins, 3 McLean, 432, Fed. Cas. No. 1,953.
²Schoerken v. Swift, etc. Co. 7 Fed. 469, 19 Blatchf. 209.
⁴Resolution No. 5, Jan. 11, 1871, 16 Stat. 590.

¹⁸New York v. American Cable Co.

ings relating to trademarks belonging to the patent office, and of certificates of registration, authenticated by the seal of the patent office and certified by the commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor and paying the fee required by law shall have certified copies thereof.

§ 11 of act Feb. 20, 1905, c. 592, 33 Stat. 727, U. S. Comp. Stat. 1905, p. 672.

§ 1798. Extracts from journals of Congress as evidence.

Extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.

R. S. § 895, U. S. Comp. Stat. 1901, p. 673.

The section was carried forward from an act of 1846.⁷ It is not a statutory declaration that the journals are the highest evidence of the facts stated in them or a complete evidence of all that occurs in the progress of business in the respective houses.⁸

§ 1799. Copies of records, etc., in offices of United States consuls, etc.

Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.

R. S. § 896, U. S. Comp. Stat. 1901, p. 674.

The section was carried into the Revised Statutes from an act of 1869.¹⁰ A somewhat similar provision relating to copies of protests before consuls is contained in Revised Statutes, § 1707.

§ 1800. Records certified from circuit to district court in certain States.

The transcripts into new books, made by the clerks of the dis-

⁷Act Aug. 8, 1846, c. 107, § 1, 9 Stat. 80.

¹⁰Act Jan. 8, 1869, c. 7, 15 Stat. 266.

⁸Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

trict courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June 27, 1864, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.

R. S. § 897, U. S. Comp. Stat. 1901, p. 674.

The section was originally enacted in 1864.¹³

§ 1801. Transcribed records in North Carolina.

The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June 4, 1872, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts, respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.

R. S. § 898, U. S. Comp. Stat. 1901, p. 674.

The section was originally enacted in 1872.¹⁶

§ 1802. Copies of judicial records—lost records and restoration thereof.

The statutes creating new judicial districts or divisions sometimes provide for the copying of original records or for their transfer into the newly created district or division.¹⁸ Statutory provisions respecting transcripts of records into new books, and for

¹³Act June 27, 1864, c. 165, §§ 2, 4, 13 Stat. 199.

¹⁶Act June 4, 1872, c. 282, § 10, 17 Stat. 217.

¹⁸See ante, § 381

replacing, proving or establishing lost or destroyed records, are contained in a preceding chapter of this code.¹⁹

Author's section.

§ 1803. Legislative and judicial records of States and Territories as evidence.

The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto.^{[a]-[b]} The records and judicial proceedings of the courts of any State or Territory,^[c] or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk,^[d] and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form.^[e] And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.^[f]

R. S. § 905, U. S. Comp. Stat. 1901, p. 677.

[a] Scope of section.

The Constitution provides that full faith and credit must be given in each State to the judicial proceedings of every other State,³ and by the power thus conferred Congress has prescribed in this section the manner in which such proceedings shall be proved.⁴ The section does not apply to the mode of proof used in the courts of the United States,⁵ being limited in terms to the records and judicial proceedings of the State courts.⁶ But it is the customary practice in Federal courts to follow its provisions in authenticating records and judicial proceedings, and such authentication has always been held sufficient.⁷

[b] Statutes of State or Territory.

This statute requires no other or further formality to authenticate an act of a State legislature than the seal of the State. It must be pre-

¹⁹See ante, §§ 387-392.

³United States Const. Art. 4, § 1.

⁴Wittmore v. Malcomson, 28 Fed. 605.

⁵National, etc. Society v. Spiro, 94 Fed. 750, 37 C. C. A. 388.

⁶Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 438; see also Owings v.

Hull, 9 Pet. 607, 9 L. ed. 246; In re Neale, 3 Nat. B. R. 177, Fed. Cas. No. 10,066; O'Hara v. Mobile, etc. R. Co. 76 Fed. 718, 22 C. C. A. 512.

⁷O'Hara v. Mobile, etc. Ry. Co. 76 Fed. 718, 22 C. C. A. 512; see also

Buford v. Hickman, Fed. Cas. No. 2, 114a Hempst. 232.

sumed that such seal was affixed by the person having the custody thereof and competent to do the act.¹⁰ Hence a printed pamphlet without seal, purporting to be the law of a territory was held to be inadmissible.¹¹

[c] "Records and judicial proceedings."

Judicial proceedings under this section are not confined to judgments. Thus where the State law provides for the examination of a debtor in proceedings supplemental to execution such examination constitutes a judicial proceeding within the meaning of the section.¹² Likewise a discharge under a State insolvent law was held a judicial proceeding.¹⁴ But the provisions of this section do not apply to a grand jury such body not being a court.¹⁵

[d]—to be attested by clerk.

The court is precluded from receiving any other evidence than the record itself to show that the attestation was not in due form. Hence when the certificate of the clerk states that "the foregoing is truly taken from the record of proceedings" it will be presumed to be a full copy of the record of all the proceedings in the case.¹⁶ A recent State decision holds that an attestation by a deputy clerk is not within the terms of the statute.¹⁹

[e]—and certificate of magistrate attached.

The certificate of the judge, chief justice, or magistrate that the attestation was in due form of law is necessary,² and a copy of a judgment certified by the clerk alone is insufficient.³ Where the magistrate merely verifies the handwriting of the clerk but gives no certificate as to form, it is a fatal defect.⁴ Since the certificate must be by "the judge, chief justice or presiding magistrate" and this must appear upon the certificate,⁵ the signing of the judge, as "one of the judges" is insufficient.⁶ But it is held that the Federal courts will take judicial notice that the judge who signed the certificate was the sole judge of the district in which the proceedings are of record.⁸

[f] Faith and credit to be given when so authenticated.

By the terms of the above section, a record or judicial proceeding when

¹⁰United States v. Amedy, 11 Wheat. 392, 6 L. ed. 503.

¹¹Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3,328.

¹²In re Rooney, 6 Nat. B. R. 163, Fed. Cas. No. 12,032.

¹⁴Channing v. Reiley, 4 Cranch C. C. 528, Fed. Cas. No. 2,596.

¹⁵In re Dana, 68 Fed. 886; see also In re Leary, 10 Ben. 197, Fed. Cas. No. 8,162.

¹⁸Ferguson v. Harwood, 7 Cranch, 408, 3 L. ed. 386.

¹⁹Willock v. Wilson, 178 Mass. 68, 59 N. E. 757.

²Trigg v. Conway, Hempst. 538, Fed. Cas. No. 14,172; see also Catlin v. Underhill, 4 McLean, 199, Fed. Cas. No. 2,523.

³Northwestern, etc. Ins. Co. v. Stevens, 71 Fed. 258, 18 C. C. A. 107.

⁴Craig v. Brown, 1 Pet. C. C. 352, Fed. Cas. No. 3,328.

⁵United States v. Biebusch, 1 Fed. 213, 1 McCrary, 42.

⁶Stewart v. Gray, Hempst. 94, Fed. Cas. No. 13,428a.

⁸Bennett v. Bennett, Deady 299, Fed. Cas. No. 1,318.

authenticated in accordance therewith, shall be given faith and credit in every court of the United States thus including Federal courts.¹⁰ Hence the Federal courts are bound to give the same faith and credit to State courts which the courts of another State are bound to give to them.¹¹ But the Federal courts take judicial knowledge of the laws of every State in the Union and thus do not require the certificate of the judge of a State court that the attestation of the clerk thereof is in due form of law, that matter being decided by their own knowledge of the laws of the State.¹² The mode of authentication prescribed by the section is not conclusive on the State courts however and they may adopt any other method.¹⁴ The question of the sufficiency of the authentication is one of law not of fact.¹⁵

§ 1804. — other State and Territorial records.

All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.

R. S. § 906, U. S. Comp. Stat. 1901, p. 677.

¹⁰Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 1,318.
Cas. No. 5,206.

¹⁴Gribble v. Pioneer Press Co. 15-

¹¹Union, etc. Bank v. Memphis, Fed. 689, 5 McCrary, 73.

¹¹¹Fed. 561, 49 C. C. A. 455.

¹⁵Wittmore v. Malcomson, 28 Fed.

¹³Bennett v. Bennett, Deady, 299, 605.

This statute does not exclude every other mode of authentication.¹⁹ The "faith and credit" imparted to an authenticated State record does not extend the effect of a decision against a State to the United States nor make an award or judgment which might be final against a State, either obligatory in law or conclusive in evidence against the United States.²⁰

§ 1805. — secondary proof of State court records where certified copies refused.

In any case where a party is entitled to copies of the record and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such record and proceedings are needed may, on proof by affidavit that the clerk of said State court, has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow; and, thereupon, such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

R. S. § 645, U. S. Comp. Stat. 1901, p. 523.

§ 1806. Copies of foreign records, etc.,—land titles.

It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land office to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the solicitor of the treasury, who shall file them in his

¹⁹Logansport, etc. Co. v. Knowles, 20 Williams v. U. S. 137 U. S. 136, 4 Chicago L. N. 75, Fed. Cas. No. 34 L. ed. 598, 11 Sup. Ct. Rep. 43, 8,466.

office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals.

R. S. § 907, U. S. Comp. Stat. 1901, p. 678.

§ 1807. Judicial notice of seal of Secretary of Commerce and labor.

The said secretary [i. e. of Commerce and Labor] shall cause a seal of office to be made for the said department of such device as the President shall approve, and judicial notice shall be taken of the said seal.

Part of § 1, act Feb. 14, 1903, c. 552, 32 Stat. 825, U. S. Comp. Stat. 1905, p. 63.

§ 1808. Evidence of United States statutes.

The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

R. S. § 908, U. S. Comp. Stat. 1901, p. 678.

§ 1809. Richardsons' Supplement to Revised Statutes as evidence.

The publication herein authorized [i. e., supplement to the Revised Statutes by Wm. A. Richardson] shall be taken to be prima facie evidence of the laws therein contained in all the courts of the United States, and of the several States and Territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress: Provided, That nothing herein contained shall be construed to change or alter any existing law.

Part of Joint Resolution June 7, 1880, No. 44, 21 Stat. 308, U. S. Comp. Stat. 1901, p. 2587.

The Revised Statutes constitute a legislative declaration of the statutory law as it existed December 1, 1873. If clear and free from doubt or ambiguity, they are final. Reference cannot be had to the laws from which
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they were framed for the purpose of creating a doubt or ambiguity.⁵ But if the language used is of doubtful import then it is permissible to look to the original statutes for the purpose of resolving such doubt.⁶ There is no inference that Congress intended to change existing law by the revision, unless an intent to do so clearly appears.⁷ If prior language is retained, a prior established judicial construction is enacted into the revision, with it.⁸

§ 1810. — further supplement as evidence.

The publication [i. e., of the supplement of Revised Statutes, to include the general laws of the forty-seventh, forty-eighth, forty-ninth, fiftieth and fifty-first Congresses] herein authorized shall be taken to be prima facie evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of any original act passed by Congress.

§ 3 of act Apr. 9, 1890, c. 73, 26 Stat. 50, U. S. Comp. Stat. 1901, p. 2589.

§ 1811. Statutes at large as evidence.

The said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several States therein.

§ 8 of act June 20, 1874, c. 333, 18 Stat. 113, U. S. Comp. Stat. 1901, p. 3757.

§ 1812. — later provision.

The pamphlet copies of the statutes and the bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several States therein.

Part of § 73, act Jan 12, 1895, c. 23, 28 Stat. 601, U. S. Comp. Stat. 1901, p. 3766.

⁵United States v. Bowen, 100 U. S. 513, 25 L. ed. 631; Arthur v. Dodge, 101 U. S. 36, 25 L. ed. 948; Victor v. Arthur, 104 U. S. 499, 26 L. ed. 633; Deffebach v. Hanke, 115 U. S. 402, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

⁶Cambria Iron Co. v. Ashburn, 118 U. S. 57, 30 L. ed. 60, 6 Sup. Ct. Rep. 929; Bate Refrig. Co. v. Sulzberger, 157 U. S. 39, 39 L. ed. 601, 15 Sup. Ct. Rep. 508.

⁷United States v. Ryder, 110 U. S. 740, 28 L. ed. 308, 4 Sup. Ct. Rep. 196; Logan v. United States, 144 U. S. 302, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; McDonald v. Hovey, 110 U. S. 629, 28 L. ed. 269, 4 Sup. Ct. Rep. 142.

⁸Sessions v. Romadka, 145 U. S. 42, 36 L. ed. 609, 12 Sup. Ct. Rep. 799.

§ 1813. Certified copies of bankruptcy referee's proceedings and papers as evidence.

Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

Clause d of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3430.

§ 1814. Commerce Commission's reports as evidence.

The commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The commission may also cause to be printed for early distribution its annual reports.

Part of § 1, act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended June 29, 1906, c. 3591, § 3, 34 Stat. 589.

CHAPTER 55.

COSTS.

- § 1822. Cross references.
- § 1823. When poor person may sue without paying costs, etc.
- § 1824. —affidavit after suit brought—perjury therein.
- § 1825. —such poor persons entitled to process, etc.
- § 1826. —assignment of counsel,—dismissal—costs on judgment—against United States.
- § 1827. No costs to plaintiff in circuit court if recovery below certain sum.
- § 1828. Costs in copyright suits.
- § 1829. Costs in infringement of patent.
- § 1830. Informer on penal statute to pay costs if nonsuit or discontinuance.
- § 1831. —or if judgment rendered for defendant.
- § 1832. Limit of costs where several suits filed instead of joint action.
- § 1833. Courts to make orders to save costs.
- § 1834. Costs in case of several libels or informations against vessel or cargoes.
- § 1835. Successful claimant after seizure entitled to possession when his costs paid.
- § 1836. District attorneys costs limited to one action when several separately brought.
- § 1837. United States liable for only four witness fees on preliminary criminal examinations.
- § 1838. Attorney liable for costs vexatiously increased.
- § 1839. Bill of costs how taxed.
- § 1840. Bill of costs to be sworn to.
- § 1841. Costs in State court taxable after removal.
- § 1842. Damages and costs on affirmance in error.
- § 1843. Costs on dismissal in appellate court.
- § 1844. —on affirmance.
- § 1845. —rule on reversal in Supreme Court.
- § 1846. —in neither case is United States liable.
- § 1847. —provisions apply to review under act of 1891.
- § 1848. —rule on reversal in circuit court of appeal.
- § 1849. Cost of printing in Supreme Court and Court of Claims.
- § 1850. —Supreme Court rate as to cost of printing.
- § 1851. Costs on modification—unnecessary matter.
- § 1852. Costs on appeal to be inserted in mandate.
- § 1853. —rule in circuit court of appeals.
- § 1854. —printing briefs and opinions as taxable costs.

§ 1822. Cross references.

Provisions as to costs in suit on a marshal's bond,¹ as to costs in searches and seizures² and in the Court of Claims³ are given in earlier chapters. Elsewhere also are two provisions respecting costs in internal revenue suits.⁴ In suits improperly commenced in or removed to the circuit court, the court on dismissal or remand "shall make such orders as to costs as shall be just."⁵ Fees as an element of taxable costs are considered in the chapter on fees.⁶ Fees and costs in bankruptcy are considered in a later chapter.⁷ Elsewhere also are provisions as to costs in extradition proceedings,⁸ in suits on government contractors' bonds.⁹

Author's section.

§ 1823. When poor person may sue without paying costs, etc.

Any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action,^{[a]-[b]} upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.^[c]

§ 1, of act July 20, 1892, c. 209, 27 Stat. 252, U. S. Comp. Stat. 1901, p. 706.

[a] Scope of act.

The act does not apply to proceedings in the United States Supreme Court, hence an application thereunder for leave to prosecute a writ of error without giving the required security has been dismissed.¹² Whether the act applies to civil proceedings in the circuit court of appeals apparently depends on the particular circuit. In the sixth circuit the rule is established that the act applies,¹³ and the same is true in the first circuit.¹⁴

¹Ante, § 629.

²Ante, §§ 1520, 1521.

³Ante, § 1490.

⁴Ante, §§ 1415, 1416.

⁵Ante, § 1154.

⁶Ante, § 704, et seq.

⁷Post, §§ 2214 et passim.

⁸Ante, § 1660.

⁹Ante, §§ 1420, et seq. For other provisions see the Index.

¹²Gallaway v. Ft. Worth Bank, 186 U. S. 177, 46 L. ed. 1111, 22 Sup. Ct. Rep. 811.

¹³Reed v. Pennsylvania Co. 111 Fed. 714, 49 C. C. A. 572; Fuller v. Montague, 53 Fed. 206; Brinkley v. Louisville, etc. R. Co. 95 Fed. 345.

¹⁴Columb v. Webster, etc. Co. 76 Fed. 198; Volk v. Sturtevant Co. 99 Fed. 532, 39 C. C. A. 646.

In the fifth circuits however it is held that the act does not apply to appellate proceedings.¹⁵ The application of the act in cases of appellate proceedings in criminal cases is also denied.¹⁶ The word "costs" as used in this section means taxable costs to be recovered by the adverse party and the statute intends that no security or deposit shall be required therefor. "Fees" means, as respects the clerk, his fees in the strict sense of the word and does not relate to his disbursements.¹⁷

[b] Petitioner need not prepay fees, etc.

The act provides that the clerk cannot demand fees and costs in advance but it does not take away from him the right to charge and recover for his services and he is entitled to a lien on any judgment recovered.¹ Thus, where a libellant who sues in admiralty in forma pauperis recovers judgment without costs for a sum of money which is paid into the register of the court he cannot withdraw the same without payment of the fees of the clerk.² Where the plaintiff suing in forma pauperis takes a nonsuit after the court has directed a verdict against him a subsequent action by him for the same cause in another district will be stayed until he pays the costs in the first.³

[c] Sufficiency of affidavit.

The citizenship of the applicant for leave to sue in forma pauperis must affirmatively appear in the affidavit.⁴ It must appear also that he is unable to give security for costs and that he believes he is entitled to the redress he seeks.⁷ These are statutory requirements not to be evaded, and a showing in forma pauperis in compliance with a court rule is insufficient.⁸ While the personal affidavit of the plaintiffs and of each who is sui juris, seems to be required,¹⁰ an affidavit by a widow of the poverty of her infant child was held sufficient.¹¹ The affidavit ought to be sufficiently certain to uphold indictment for perjury if false, with the least possible chance for evasion in its terms.¹² Where the plaintiff sues as administratrix the petition must set forth the financial condition of the estate, since it may be in a position to furnish the necessary funds.¹³ Likewise where the plaintiff has made a contract with his attorney to prosecute the suit for a fee contingent on recovery, a State statute giving the attorney a lien on

¹⁵The Presto, 93 Fed. 522, 35 C. Donovan v. Salem, etc. Co. 134 Fed. C. A. 394.

¹⁶Bristol v. United States, 129 Fed. 87, 63 C. C. A. 529.

¹⁷Columb v. Webster Mfg. Co. 76 Fed. 198.

¹Columb v. Webster Mfg. Co. 76 Fed. 200.

²Davis v. Adams, 109 Fed. 271.

³Kimble v. Western Union Tel. Co. 70 Fed. 888.

⁴Volk v. Sturtevant Co. 99 Fed. 532, 39 C. C. A. 646; Boyle v. Great Northern R. Co. 63 Fed. 539; see also

Donovan v. Salem, etc. Co. 134 Fed. 317; 7Donovan v. Salem, etc. Co. 134 Fed. 317; Volk v. Sturtevant, 99 Fed. 532, 39 C. C. A. 646.

⁸Donovan v. Salem, etc. Co. 134 Fed. 317.

¹⁰Reed v. Pennsylvania, etc. Co. 111 Fed. 714, 49 C. C. A. 572.

¹¹McDuffee v. Boston, etc. R. Co. 82 Fed. 865.

¹²Woods v. Bailey, 111 Fed. 121.

¹³Volk v. Sturtevant Co. 99 Fed. 532, 39 C. C. A. 646.

the proceeds of the suit, the petition must set forth that the attorney is a poor person within the meaning of the act.¹⁴ In a case arising in the second circuit the court intimated that the petition should contain a further affidavit setting forth the facts which the plaintiff expected to prove thereby showing that the cause of action was not malicious or frivolous.¹⁵

§ 1824. — affidavit after suit brought—perjury therein.

After any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

§ 2 of act July 20, 1892, 27 Stat. 252, c. 200, U. S. Comp. Stat. 1901, p. 707.

An affidavit filed after action brought as authorized by the above section, was held to be in due season though it was not filed in answer to a motion for a cost bond, but after an order granting the motion.¹⁶

§ 1825. — such poor persons entitled to process, etc.

The officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

§ 3, of act July 20, 1892, c. 209, 27 Stat. 252, U. S. Comp. Stat. 1901, p. 707.

Refusal of clerk or marshal to comply with the statute after a sufficient affidavit of poverty is filed may be remedied by an order of the court upon them in a summary proceeding.¹

§ 1826. — assignment of counsel,—dismissal—costs on judgment—against United States.

The court may request any attorney of the court to represent such poor person,^[a] if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.^[b] Judgment may be rendered for costs at the conclusion

¹⁴Feil v. Wabash R. Co. 119 Fed. 490; Boyle v. Great Northern R. Co. 82 Fed. 539.

¹⁵Whelan v. Manhattan R. Co. 86 Fed. 219.

¹⁶McDuffee v. Boston, etc. R. Co. 82 Fed. 865.

¹Columb v. Webster Mfg. Co. 76 Fed. 198.

of the suit, as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred.

§§ 4, 5 of act July 20, 1892, c. 209, 27 Stat. 252, U. S. Comp. Stat. 1901, p. 707.

[a] Attorney assigned by court.

An attorney assigned by the court pursuant to the above section is entitled to compensation only in event of success. In such case he may apply to the court for an order fixing a fair compensation for the services he actually renders, out of the sum recoverable.⁵

[b] Investigation of truth of affidavit.

The practice is not uniform as to the time when the truth of the allegation of the poverty is to be determined. It seems to be well settled in the second circuit that on filing an affidavit in proper form the party is entitled to proceed with the case in forma pauperis leaving it to the opposite party to contest the truth of the affidavit on a motion to dismiss.⁶ In the sixth circuit however it is held that upon the presentation of an affidavit the court may inquire into the facts and grant or refuse relief according as it is found true or otherwise;⁷ and such preliminary investigation seems also to be favored in the eighth district.⁸ Where the petition to obtain the benefit of the act was adjudged insufficient on account of a mere slip in the form of the oath, and security was ordered, it was held the application might be renewed on sufficient petition.⁹

§ 1827. No costs to plaintiff in circuit court if recovery below certain sum.

When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity,^{[a]-[b]} other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libelant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs.^[c]

R. S. § 968, U. S. Comp. Stat. 1901, p. 702.

⁵Whelan v. Manhattan R. Co. 86 Fed. 219.

⁶Woods v. Bailey, 113 Fed. 390; McDuffee v. Boston, etc. R. Co. 82 Fed. 865; see also Wickelman v. Dick Co. 85 Fed. 851, 29 C. C. A. 436; but see Whelan v. Manhattan R. Co. 86 Fed. 219.

⁷Boyle v. Great Northern R. Co. 63 Fed. 539; Brinkley v. Louisville, etc. R. Co. 95 Fed. 345.

⁸Whittle v. St. Louis R. Co. 104 Fed. 286.

⁹Woods v. Bailey, 113 Fed. 390.

[a] Scope of section.

The section is not affected by the fact that the jurisdictional limit of the circuit court has been raised since its enactment from five hundred dollars to two thousand dollars.¹² It does not apply where a statute expressly provides that a plaintiff shall have full costs regardless of the amount of recovery,¹³ nor does it apply to cases of removal from the State to the circuit court such cases not being "originally brought" in the circuit court.¹⁴ But in an action against joint defendants the statute applies where the total amount exceeds five hundred dollars although the amount collectible against each defendant is less.¹⁵

[b] Suits in equity.

In a suit to set off judgments against each other no costs were allowed where the plaintiff obtained a decree adjudging that one of his judgments amounting to less than five hundred dollars should be set off.¹⁶ So, where the sole object of the bill in equity is to obtain a money decree and the petitioner fails to recover as much as five hundred dollars it is the imperative duty of the court to deny costs to him.²⁰

[c] Prevailing plaintiff when subjected to costs.

The apparent object of the statute in making the prevailing plaintiff subject to costs is to punish him for bringing in the defendant for a frivolous claim that could have been more cheaply settled in some other court, or a claim which has been brought with an apparent view to vex the defendant with additional expense.⁴ So the rule is established that the plaintiff will not be required to pay the defendants costs where the amount recovered by the plaintiff is less than five hundred dollars, unless by way of penalty for bringing in a Federal court a suit which should have been tried in a State court.⁵ Such penalty should not be imposed unless it appears either from the declaration or on trial that the damages were laid in excess of

¹²Eastman v. Sherry, 37 Fed. 844; Johnson v. Watkins, 40 Fed. 187.

¹³Merchant v. Lewis, 1 Bond, 172, Fed. Cas. No. 9,437.

¹⁴Field v. Schell, 4 Blatchf. 435, Fed. Cas. No. 4,771; Howard v. American Dairy Co. 6 Am. L. Rec. 193, Fed. Cas. No. 6,753; Scupps v. Campbell, 3 Cent. L. J. 521, Fed. Cas. No. 12,562; Kreager v. Judd, 5 Fed. 27; see also Pellet v. Manufacturers, etc. Co. 104 Fed. 512; but see Richter v. Magone, 47 Fed. 192; Coggill v. Lawrence, 2 Blatchf. 304, Fed. Cas. No. 2,957.

¹⁵Johnson v. Mississippi, etc. R. Co. 31 Fed. 551.

¹⁶See ante, § 77.

¹⁹National, etc. Co. v. Tugman, 67 Fed. 16.

²⁰Van Sieten v. Bartol, 96 Fed. 796; see also Allen v. Fairbanks, 45 Fed. 448.

⁴See Hunter v. Marlboro, 2 W. & M. 168, Fed. Cas. No. 6,908; Greene v. Bateman, 2 W. & M. 359, Fed. Cas. No. 5,762.

⁵Cottle v. Payne, 3 Day, 289, Fed. Cas. No. 3,268; Greene v. Bateman, 2 W. & M. 359, Fed. Cas. No. 5,762; Hamilton v. Baldwin, 41 Fed. 429; Van Sieten v. Bartol, 96 Fed. 796.

the jurisdictional amount, now two thousand dollars, merely for the purpose of giving colorable jurisdiction.⁶

§ 1828. Costs in copyright suits.

In all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon.

R. S. § 972, U. S. Comp. Stat. 1901, p. 703.

The section was carried into the Revised Statutes from an act of 1870.⁹

§ 1829. Costs on infringement of patent.

When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the patent office before the suit was brought.

R. S. § 973, U. S. Comp. Stat. 1901, p. 703.

The section was originally enacted in 1870.¹² It is the general rule in infringement suits that where the complainant recovers only nominal damages the costs of reference and proceedings thereunder are taxed against him.¹³ Under the provisions of this section and those of R. S. § 4922,¹⁶ the patentee cannot recover costs on a successful suit unless a disclaimer has been properly entered.¹⁷ Those provisions do not apply to costs in an appellate court however where the decree below dismissing the suit was found erroneous, and the complainant was compelled to appeal to obtain relief.¹⁸ The section applies only when a disclaimer is necessary to save the patent¹⁹ hence where there is no necessity for filing a disclaimer a failure to do so does not effect the courts discretion to allow the complainant his costs.²⁰

⁶McCarthy v. American Thread Co. 143 Fed. 678.

⁹Act July 8, 1870, c. 230, 16 Stat. 215.

¹²Act July 8, 1870, c. 230, 16 Stat. 207.

¹³Kansas City, etc. Co. v. Devol, 127 Fed. 370; and cases cited.

¹⁶Ante, § 1174.

¹⁷See O'Reilly v. Morse, 15 How. 120, 14 L. ed. 601; Gage v. Herring, 107 U. S. 640, 27 L. ed. 601, 2 Sup.

Ct. Rep. 819; Metallic, etc. Co. v. Brown, 110 Fed. 665, 49 C. C. A. 147; Fairbank v. Stickney, 123 Fed. 79, 59 C. C. A. 209; Kahn v. Starrels, 136 Fed. 597, (C. C. A.); Ide v. Thorlicht, 115 Fed. 150, 53 C. C. A. 341.

¹⁸Johnson v. Foos Mfg. Co. 141 Fed. 90.

¹⁹National, etc. Co. v. De Forest Tel. Co. 140 Fed. 449.

²⁰Gamewell, etc. Co. v. Municipal, etc. Co. 77 Fed. 490, 23 C. C. A. 250.

§ 1830. Informer on penal statute to pay costs if nonsuit or discontinuance.

If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant.

R. S. § 975, U. S. Comp. Stat. 1901, p. 703.

The section was enacted in 1792.² Costs were thus authorized against informers upon a penal statute or against private prosecutors of an indictment by the early English statutes.³ Where suit is brought by an informer on a statute which has been declared to be unconstitutional, if the court has general jurisdiction of the matter it may decree costs to the defendant upon a discontinuance by the plaintiff.⁴

§ 1831. — or if judgment rendered for defendant.

If any informer on a penal statute, to whom the penalty, or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal, and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees.

R. S. § 976, U. S. Comp. Stat. 1901, p. 704.

The section was originally enacted in 1799.⁵ It includes prosecutions in the name of the United States in whole or in part to the use of the informer as well as those brought by the informer in his own name and in the case first mentioned the informer is liable to costs, and the United States are not liable if the informer is not "an officer" etc.⁶ The words

²Act May 8, 1792, c. 36, 1 Stat. 277.

³Lowe v. Kansas, 163 U. S. 86, 41 L. ed. 80, 16 Sup. Ct. Rep. 1031.

⁴Cooper v. New Haven Steamboat Co. 18 Fed. 588.

⁵Act Fed. 28, 1799, c. 19, 1 Stat. 626.

⁶United States v. Steamboat Planter, Newb. Adm. 262, Fed. Cas. No. 16,054.

"fees of such prosecution" refer to fees for services rendered to the party prosecuting and to those only.⁷

§ 1832. Limit of costs where several suits filed instead of joint action.

If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court.

R. S. § 977, U. S. Comp. Stat. 1901, p. 704.

The section was carried into the Revised Statutes from an act of 1813.¹⁰ It contemplates several action by a single plaintiff against several defendants who might be joined.¹¹

§ 1833. Courts to make orders to save costs.

When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts, for avoiding unnecessary costs or delay in the administration of justice.

Part of R. S. § 921, U. S. Comp. Stat. 1901, p. 685.

The section also provides for the consolidation of such causes.¹² It was carried into the Revised Statutes from an act of 1813.¹³

§ 1834. Costs in case of several libels or informations against vessel or cargoes.

When proceedings are had before a court of the United States or of the Territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or

⁷In re Stover, 1 Curt. 93, Fed. Cas. No. 13,506.

¹⁰Act July 22, 1813, c. 14, § 3 Stat. 19.

¹¹The Young Mechanic, 3 Ware, 58, Fed. Cas. No. 18,182.

¹²See ante, § 823.

¹³Act July 22, 1813, c. 14, § 3, 3 Stat. 21.

informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims.

R. S. § 978, U. S. Comp. Stat. 1901, p. 704.

The section was originally enacted in 1813.¹⁵ It apparently applies to the case of several libelants and is not restricted to cases where the several libels are all filed by the same party.¹⁶

§ 1835. Successful claimant after seizure entitled to possession when his costs paid.

When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States, and libeled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid.

R. S. § 979, U. S. Comp. Stat. 1901, p. 705.

The section was enacted in 1813.¹⁸ Pursuant thereto, the claimant is entitled to possession when the costs including the fees of the court officers are paid.¹⁹

§ 1836. District attorneys costs limited to one action when several separately brought.

When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them.

R. S. § 980, U. S. Comp. Stat. 1901, p. 705.

The section was carried forward into the Revised Statutes from an act of 1853.³

§ 1837. United States liable for only four witness fees on preliminary criminal examinations.

In no case shall the fees of more than four witnesses be taxed

¹⁵Act July 2, 1813, c. 14, § 2, 3 Stat. 20.

¹⁶The R. P. Chase, 3 Ware, 294, Fed. Cas. No. 12,099; The Sarah E. Kennedy, 25 Fed. 672; but see The Young Mechanic, 3 Ware, 58, Fed. Cas. No. 18,182.

¹⁸Act July 22, 1813, c. 14, § 3, 3 Stat. 21.

¹⁹In re Stover, 1 Curt. 93, Fed. Cas. No. 13,506.

³Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision, as in other cases.

R. S. § 981, U. S. Comp. Stat. 1901, p. 705.

The section was originally enacted in 1856.⁴

§ 1838. Attorney liable for costs vexatiously increased.

If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

R. S. § 982, U. S. Comp. Stat. 1901, p. 706.

§ 1839. Bill of costs how taxed.

The bill of fees of the clerk, marshal, and attorney,^[a] and the amount paid printers^[b] and witnesses,^[c] and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases whereby law costs are recoverable^[d] in favor of the prevailing party,^[e] shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party.^{[f]-[g]} Such taxed bills shall be filed with the papers in the cause.

R. S. § 983, U. S. Comp. Stat. 1901, p. 706.

[a] Fees of clerks, marshals, etc.

The fees of the clerks, marshals, commissioners and proctors have been held to be their individual property and not that of the parties to the cause wherein they have been earned.⁹ A sheriff's charge for serving subpoenas cannot be taxed unless it appears that he was acting for the marshal.¹⁰

[b] Printing expenses taxable as costs.

Since the expense of printing a brief is nowhere made by statute a part of the taxable costs, it was not allowed in the third circuit there being no

⁴Act Aug. 16, 1856, c. 124, § 3, 11 C. A. 414; but see Celluloid Mfg. Co. v. Chandler, 27 Fed. 9.

⁹Aiken v. Smith, 57 Fed. 425, 6 C. ¹⁰St. Matthews, etc. Bank v. Fidelity, etc. Co. 105 Fed. 161.

rule or practice in that circuit permitting it.¹¹ So also in the ninth circuit costs of printing briefs were held not taxable there being no rule requiring them to be printed.¹² Likewise the cost of printing a bill, answer and testimony was held not taxable where no rule of court authorized it, the court refusing even to enforce an agreement between the attorneys relating to such charge.¹³ But where the record in a cause was printed by order of the court so that copies thereof could be used on appeal and they were so used without any further expense the costs of the printing was held to be taxable in favor of the party obtaining a decree for costs.¹⁴ By an act of 1877¹⁵ costs of printing records in the Supreme Court and in the Court of Claims are to be paid by the losing party.¹⁶ Disbursements by counsel or parties for printing briefs on appeal to the Supreme Court cannot be allowed as costs.¹⁷

[c]—amount paid witnesses taxable as costs.

Under this section the prevailing party can never recover more than the amount actually paid the witnesses.¹ And even this amount cannot be recovered if in any instance it exceeds the legal fees due the witnesses.² Where witnesses are paid in one or more cases and not in others there is a strong presumption that they are not to be paid in the latter case especially where there is some lapse of time between the rendition of service and the taxation and their unpaid fees are *prima facie* not taxable in such cases.³

[d] What transcripts and copies taxable.

Where the copy or transcript is simply used for convenience of the counsel and is not necessarily used on trial it is not taxable against the other party as costs.⁵ Thus the transcript of the evidence for the personal use of counsel in preparing a case for the appellate court has been held non-taxable.⁶ However copies of an answer in equity required by the rules of the court to be furnished are taxable,⁷ as are notarial protest

¹¹Luxfer, etc. Co. v. Elkins, 99 Fed. 29; and see Kelly v. Springfield R. Co. 83 Fed. 183.

¹²Gird v. California Oil Co. 60 Fed. 1011.

¹³Lee v. Simpson, 42 Fed. 434.

¹⁴Ferguson v. Dent, 46 Fed. 88.

¹⁵See post, § 1849.

¹⁶Railroad Co. v. Collector, 96 U. S. 594, 24 L. ed. 825.

¹⁷Ex parte Hughes, 114 U. S. 548, 29 L. ed. 281, 5 Sup. Ct. Rep. 1008.

¹Burrow v. Kansas, etc. R. Co. 54 Fed. 280; O'Neil v. Kansas, etc. R. Co. 31 Fed. 663; Beckwith v. Easton, 4 Ben. 358, Fed. Cas. No. 1,212; The Highlander, 19 How. Pr. 334; Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

²Burrow v. Kansas, etc. R. Co. 54 Fed. 280.

³Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

⁵The William Branfoot, 52 Fed. 395, 3 C. C. A. 155; Kaempfer v. Taylor, 78 Fed. 795; see also Gunther v. Liverpool, etc. Ins. Co. 10 Fed. 830, 20 Blatchf. 390; Kelly v. Springfield, R. Co. 83 Fed. 183; Monahan v. Godkin, 100 Fed. 196; Wooster v. Handy, 23 Fed. 49, 23 Blatchf. 112.

⁶Pine River, etc. Co. v. United States, 186 U. S. 297, 46 L. ed. 1172, 22 Sup. Ct. Rep. 920.

⁷Yale Lock, etc. Co. v. Colvin, 14 Fed. 260, 21 Blatchf. 168.

fees in a suit upon a note.⁸ But copies of deeds and records which are but muniments of the party's title are held not taxable on the ground that such party is presumed to have such papers in his possession or to be able to obtain them from his predecessors in title.⁹ On the other hand transcripts which show a want of title in the other party are held to be taxable.¹⁰

It has been held that the language of the statute implies that the copies must actually have been used on or in the trial or final hearing or at least have been obtained for such use under a rule or an order or a stipulation.¹¹ Hence in a patent infringement suit, dismissed on plaintiff's motion with the usual costs to the defendant, it was held that six certified copies of patents procured by the defendant to enable him to properly present his defense, could not be included in the costs, not having been used in the trial, or obtained under a rule, order or stipulation.¹²

[e] Prevailing party.

It is the general rule in civil cases at least that where the United States is a prevailing party, the same costs may be recovered as in the case of a private individual.¹³

[f] Costs to be included in decree or judgment against losing party.

Except in the few instances otherwise provided by statute, the prevailing party in an action at law, is entitled to his costs as a matter of right.¹⁴ In equity and admiralty however the award of costs is largely a matter of discretion.¹⁵ So where a libellant makes misstatements thereby causing extra expense in the taking of testimony, though successful, he should be held liable for the extra expense incurred.²⁰ Likewise in an equity suit where a successful party has called an unnecessary number of witnesses he can recover costs and fees only as to such number as was reasonable.¹ In equity suits costs of travel and attendance may be taxed in favor of the successful party.² Costs on reversal and affirmance and dismissal are considered in following sections.³

[g] Review of trial court's decision as to costs.

Since the successful party in an action at law is generally entitled to costs as of right, a judgment rendered on dismissal denying such right is

⁸Baker v. Howell, 44 Fed. 113.

⁹Ford v. Louisville, etc. R. Co. 45 Fed. 210.

¹⁰Idem.

¹¹Wooster v. Handy, 23 Fed. 60.

¹²Ryan v. Gould, 32 Fed. 754.

¹³Pine River, etc. Co. v. U. S. 186 U. S. 296, 46 L. ed. 1172, 22 Sup. Ct. Rep. 920; and see United States v. Sanborn, 135 U. S. 281, 34 L. ed. 115, 10 Sup. Ct. Rep. 812; United States v. Davis, 54 Fed. 147, 4 C. C. A. 251.

¹⁴Western Coal, etc. Co. v. Petty, 132 Fed. 606, 65 C. C. A. 667.

¹⁵Ibid.

²⁰The Elton, 135 Fed. 446.

¹Kane v. Luckman, 131 Fed. 609; see also Terry v. Naylor, 125 Fed. 804; and see Royal, etc. Co. v. Art Metal Works, 130 Fed. 779, 66 C. C. A. 88, as to apportionment of costs where irrelevant and immaterial questions were asked by both attorneys.

²Waterman Co. v. Lockwood, 128 Fed. 174.

³Post, §§ 1845, 1844, 1843.

reviewable by writ of error.⁵ In equity and admiralty however the awarding of costs is largely a matter of discretion and the general rule in such cases is a decree for costs alone is not reviewable.⁶ Where, however, the decree complained of involves the construction and application of a positive statute involving the allowance of any costs at all an appeal has been allowed.⁷

§ 1840. Bill of costs to be sworn to.

Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

R. S. § 984, U. S. Comp. Stat. 1901, p. 706.

This section applies not merely to government cases, but to all cases and to all bills of costs.¹¹ It does not require affidavits that the witness fees have been paid.¹²

§ 1841. Costs in State court taxable after removal.

Upon removal of a cause from a State to a Federal court the cause proceeds as if originally there instituted,¹⁴ and costs which have accrued in the former may be taxed under a final judgment in the latter court.

Author's section.

Costs accrued in the State court prior to a removal of the cause to the Federal court are taxable under final judgment in the latter court.¹⁵ But it has been held in the second circuit that such accrued costs are not thus taxable unless they are within the contemplation of R. S. §§ 823 and 824.¹⁶

⁵Western Coal Co. v. Petty, 132 Fed. 606, 65 C. C. A. 667.

⁶Canter v. Insurance Co. 3 Pet. 307, 7 L. ed. 688; Russell v. Farley, 105 U. S. 437, 26 L. ed. 1060; Paper Bag Cases, 105 U. S. 772, 26 L. ed. 959; City National Bank v. Hunter, 152 U. S. 516, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; Du Bois v. Kirk, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729; Clarke v. Warehouse Co. 62 Fed. 328, 10 C. C. A. 387; see, however The City of Augusta, 80 Fed. 304, 25 C. C. A. 430, allowing admiralty appeal as to costs alone.

⁷In re Michigan Cent. R. Co. 124 Fed. 733, 59 C. C. A. 643.

¹¹Jerman v. Stewart, 12 Fed. 271.

¹²Chiatovich v. Hanchett, 93 Fed. 727.

¹⁴Ante, § 1157.

¹⁵Cleaver v. Traders' Ins. Co. 40 Fed. 863; Wolf v. Connecticut, etc. Ins. Co. 1 Flipp. 377, Fed. Cas. No. 17,924; Gunther v. Liverpool, etc. Ins. Co. 10 Fed. 830, 20 Blatchf. 390; see also National Steamship Co. v. Tugman, 67 Fed. 16.

¹⁶Chadbourn v. German, etc. Ins. Co. 31 Fed. 625, 24 Blatchf. 539;

Witness fees for witnesses subpoenaed in the State court after the filing of the petition of removal will not be allowed as part of the costs on judgment on removal, but the costs of witnesses attending at the taking of depositions before the removal of the cause are allowable.¹⁷

§ 1842. Damages and costs on affirmance in error.

Where, upon a writ of error, judgment is affirmed in the supreme court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion.

R. S. § 1010, U. S. Comp. Stat. 1901, p. 715.

This section together with subdivision two of rule twenty-three of the Supreme Court rules,²⁰ takes the place of any State legislation or practice as to the affixing of damages.¹ The appellate jurisdiction of the circuit court was abolished in 1891.² Interest may be recovered as damages for the delay in the affirmance of a judgment where a United States collector is the plaintiff in error.³

§ 1843. Costs on dismissal in appellate court.

In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

Clause 1 of Supreme Court, rule 24,⁶ and of rule 31 of circuit courts of appeals in all circuits except eighth.

Costs on dismissal for want of jurisdiction.

This and the following sections set forth the rules of procedure adopted by the Supreme Court as to costs in cases of appeal, no mention being made of the allowance of costs in cases arising in the original jurisdiction of such court. However, the power of the court to award costs to either party in the latter case is undoubted.⁸

In the eighth circuit the clause excepting cases of dismissal for want of jurisdiction is omitted. It seems the well-established rule that in cases of dismissal for want of jurisdiction, costs are not allowed.¹⁰ So where the circuit court has dismissed a bill, with costs, for want of jurisdiction, the Su-

Clare v. National etc. Bank, 14 Blatchf. 445, Fed. Cas. No. 2793; see ante, §§ 706 et passim.

¹⁷Young v. Merchants, Ins. Co. 29 Fed. 273.

²⁰See post, § 2125.

¹Peoples' Bank v. Aetna Ins. Co. 76 Fed. 550.

²See ante, § 77.

³Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827.

⁶Promulgated Jan. Term, 1838, 12 Pet. VII., revised Dec. term, 1858, 21 How. XIII.

⁸Pennsylvania v. Wheeling, etc. Bridge Co. 18 How. 460, 15 L. ed. 449.

¹⁰Burnham v. Rangely, 2 Woodb.

preme Court has reversed the decision as to the granting of costs.¹¹ The rule has been applied in appeals to the circuit court before the appellate jurisdiction of that court was abolished;¹² and it has been applied also in cases arising in the district court.¹³ The reason for the rule is said to be the lack of power of the court, since "if there is no jurisdiction there is no power to do anything but strike the case from the docket."¹⁴

It has been intimated that the Revised Statutes have changed the former law as to costs, and that, construing Revised Statutes, §§ 823¹⁵ and 983¹⁶ together, the courts are authorized in all cases to award costs to the prevailing party when there are no express statutory provisions otherwise, and hence the Federal courts are not now to refuse costs when they dismiss a case for want of jurisdiction.¹⁷ This, however, has been denied.¹⁸ But where the appellee has been put to the expense of a motion to dismiss for want of jurisdiction and the case is dismissed on that ground, it is held that he may recover the costs of such motion.¹⁹ So where a cause has been dismissed in a lower court for want of jurisdiction of one defendant, the appellate court in remanding with leave to amend may allow costs of appeal to co-defendant properly before the court in the first instance.²⁰

§ 1844. — on affirmance.

In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

Clause 2 of Supreme Court, Rule 24⁴ and of rule 31 of circuit Courts of appeals in all circuits.

Costs will be allowed the appellee on affirmance⁵ and the court may in its discretion charge single or double costs, and also damages for delay.⁶ An appeal does not lie from a decree for costs;⁷ and if an appeal be taken from a decree upon the merits, and such be affirmed as to the merits it will

& M. 424, Fed. Cas. No. 2177; The McDonald, 4 Blatchf. 477, Fed. Cas. No. 8,756; Strader v. Graham, 18 How. 602, 15 L. ed. 464; Gaylords v. Kelshaw, 1 Wall. 83, 17 L. ed. 613; The Mayor v. Cooper, 6 Wall. 250, 18 L. ed. 852; Hornball v. The Collector, 9 Wall. 566, 19 L. ed. 562; Abbey v. The Stevens, 22 How. Pr. 86; Mansfield, etc. Ry. v. Swan, 111 U. S. 387, 28 L. ed. 466, 4 Sup. Ct. Rep. 510; Elk v. Watkins, 112 U. S. 98, 28 L. ed. 643, 5 Sup. Ct. Rep. 41.

¹¹Citizens Bank v. Cannon, 164 U. S. 324, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

¹²Pentlarge v. Kirby, 20 Fed. 898.

¹³Wenber v. A. Cargo, etc. 15 Fed. 288.

¹⁴The Mayor v. Cooper, 6 Wall. 247, 18 L. ed. 851.

¹⁵Ante, § 705.

¹⁶Ante, § 1839.

¹⁷United States v. Treadwell, 15 Fed. 532; Cooper v. New Haven, etc. Co. 18 Fed. 588.

¹⁸Pentlarge v. Kirby, 20 Fed. 899.

¹⁹Bradstreet Co. v. Higgins, 114 U. S. 264, 29 L. ed. 176, 5 Sup. Ct. Rep. 880.

²⁰Gaylords v. Kelshaw, 1 Wall. 83, 17 L. ed. 612.

⁴²¹How. XIII.

⁵Walton v. United States, 9 Wheat. 658, 6 L. ed. 184.

⁶See ante, § 1842.

⁷Elastic Fabrics Co. v. Smith, 100 U. S. 112, 25 L. ed. 547; Russell v.

not be reversed upon the question of costs.⁸ It is the uniform practice on the affirmance of a decree to tax an attorney's fee of \$20 to the costs allowed the defendant in error, and this practice is followed in the circuit court of appeals.⁹

The fact that the decree is sustained on other grounds than those assigned by the lower court is not necessarily a reason for depriving the appellees of their costs on appeal, especially when the appellate court has not found it necessary to consider the reasons on which the court below decided the case.¹⁰ Where both parties appeal and the decree is affirmed it is held that no costs of appeal should be allowed either party.¹¹

§ 1845. — rule on reversal in Supreme Court.

In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.^{[a]-[b]} The costs of the transcript of the record from the court below shall be a part of such costs.

Clause 3 of Supreme court rule 24 as amended in 1864.¹⁴

[a] Costs granted at court's discretion on reversal.

Clause 3 of rule 31 of the circuit court of appeals,¹⁵ which is in force in all except the ninth circuit, is substantially to the same effect as the above, and the cases involving the two rules may be considered together. While costs on appeal or writ of error are generally awarded to the successful party, such costs are within the discretion of the court and may be awarded to the loser. Thus, where it appeared that the appellant was at fault in the lower court for irregularities and for various delays in bringing the cause to a hearing on appeal, he was taxed with costs on appeal although successful in obtaining a reversal.¹⁶ Likewise where a decree is reversed because defective in form, the appellant will not be allowed costs, each party being required to pay his own, where it did not appear from the record that the attention of the lower court was called to the objection in order that it might correct the same.¹⁷ But where neither party is in default, as when in an admiralty case the judgment is reversed on new evidence not accessible at the time of the first trial, each party has been required to pay his own costs incurred on the appeal.¹⁸

Farley, 105 U. S. 437, 26 L. ed. 1061; Paper Bag, etc. Cases, 105 U. S. 772, 26 L. ed. 961; Du Bois v. Kirk, 158 U. S. 67, 39 L. ed. 899, 15 Sup. Ct. Rep. 729.

⁸Du Bois v. Kirk, 158 U. S. 67, 39 L. ed. 899, 15 Sup. Ct. Rep. 729.

⁹Kansas City, etc. R. Co. v. McDonald, 60 Fed. 523, 9 C. C. A. 129.

¹⁰Post v. Beacon, etc. Co. 89 Fed. 5. 32 C. C. A. 151.

¹¹The Parkersburgh, 5 Blachf. 247, Fed. Cas. No. 10,753; The Atlas, 10 Blachf. 459, Fed. Cas. No. 634.

¹⁴1 Wall. V.

¹⁵See following section.

¹⁶The Ethel, 66 Fed. 340, 13 C. C. A. 504.

¹⁷The Oxford, 66 Fed. 590, 13 C. C. A. 647.

¹⁸The Oxford, 66 Fed. 595, 13 C. C. A. 647.

[b] Costs on reversal for want of jurisdiction.

The general rule that the successful party on appeal shall be allowed costs does not apply where a judgment of a circuit court is reversed for want of jurisdiction appearing on the record, or because the record fails to show jurisdiction. In such a case, whether originally brought in such circuit court or removed thereto from a State court, the rule generally adopted is to allow costs against the party improperly instituting or removing the suit although he may be the appellant and therefore successful on appeal.²⁰ The reason for the rule is that such party is at fault for failing to set up the jurisdictional facts as they exist or for seeking the wrong court for relief.⁴ It does not conflict with the other well-established rule that a court which has no jurisdiction of a cause has no jurisdiction to award costs, since the appellate court has authority to correct the error of the lower court in assuming jurisdiction.³ This rule will not be applied, however, where it would be unjust.⁴ Thus, where the error is attributable to both parties the costs will be divided.⁵ So also, where an improper removal of the cause was made by the consent of the parties and without the attention of either of the courts being called to the jurisdictional facts, it was held that the parties should share the costs in the Supreme court on reversal.⁶

§ 1846. — in neither case is United States liable.

Neither of the foregoing sections⁸ shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

Clause 4 of Supreme court 24th rule⁹ and of 31st rule of circuit courts of appeals in force in all circuits.

²⁰Neel v. Pennsylvania Co. 157 U. S. 153, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 686, 14 Sup. Ct. Rep. 835; Tennessee v. Union & Planters Bank, 152 U. S. 464, 38 L. ed. 515, 14 Sup. Ct. Rep. 654; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Peninsular Iron Co. v. Stone, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; Everhart v. Huntsville College, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555; King Bridge Co. v. Otoe, 120 U. S. 225, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; Halsted v. Buster, 119 U. S. 341, 30 L. ed. 462, 7 Sup. Ct. Rep. 276; Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; Stevens v. Nichols, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; Southwestern Tel. & Telephone Co. v. Robinson, 48 Fed. 769, 1 C. C. A. 91; Craswell v. Belanger, 56 Fed.

529, 6 C. C. A. 1; Sneed v. Sellers, 68 Fed. 729, 15 C. C. A. 631; Blacklock v. Small, 127 U. S. 105, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096.

²Mansfield, etc. R. Co. v. Swan, 111 U. S. 387, 28 L. ed. 466, 4 Sup. Ct. Rep. 510.

³Montalet v. Murray, 4 Cranch, 47, 2 L. ed. 546; Mansfield R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 466, 4 Sup. Ct. Rep. 510.

⁴Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; Hancock v. Holbrook, 112 U. S. 229, 28 L. ed. 714, 5 Sup. Ct. Rep. 115; Tug River etc. Salt Co. v. Brigel, 67 Fed. 625, 14 C. C. A. 577.

⁵Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287.

⁶Hancock v. Holbrook, 112 U. S. 229, 28 L. ed. 714, 5 Sup. Ct. Rep. 115.

⁸Ante, §§ 1843-1845.

⁹21 How. XIV.

Procedure as to costs in suits by and on behalf of the United States for forfeitures etc., is set forth in preceding Code sections.¹⁰ While under the above section the Supreme court can neither give a direct judgment for costs against the United States in a suit in which they are a party,¹¹ nor allow costs to the United States in such cases, the section does not prohibit the allowance of costs in the lower courts in favor of the United States.¹² Hence where a mandate of the Supreme court directs a decree in favor of the United States without specifying costs, the circuit court may properly include therein its own costs.¹³

§ 1847 — provisions apply to review under act of 1891.

The provisions of rule . . . 24 of this court, in regard to . . . costs . . . shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act¹⁶ [i.e., the act of 1891, establishing the circuit court of appeals.]

Supreme Court Rule 38.

The provisions of Rule 24 respecting costs are embodied in the sections of this Code immediately preceding, and other following sections.¹⁷

§ 1848. — rule on reversal in circuit court of appeal.

In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

Clause 3 of rule 31 of circuit courts of appeals in force in all except ninth circuit.

In the ninth circuit this rule has been changed to read as follows: "In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court."²⁰

§ 1849. Cost of printing in Supreme Court and Court of Claims.

There shall be taxed against the losing party in each and every

¹⁰See ante, §§ 1415, 1416.

¹¹United States v. Ringgold, 8 Pet. 163, 8 L. ed. 899; Stanley v. Schwalby, 162 U. S. 272, 40 L. ed. 966, 16 Sup. Ct. Rep. 761; The Antelope, 12 Wheat. 546, 6 L. ed. 723; United States v. McLemore, 4 How. 286, 11 L. ed. 977; United States v. Boyd, 5 How. 30, 12 L. ed. 36.

¹²United States v. Southern Pac.

R. Co. 56 Fed. 865; see also United States v. Sanborn, 135 U. S. 271, 34 L. ed. 112, 10 Sup. Ct. Rep. 812.

¹³United States v. Southern Pac. R. Co. 56 Fed. 865.

¹⁶Ante, §§ 42, 77.

¹⁷Ante, §§ 1843, 1844, 1845, 1846; post, § 1852.

²⁰See 90 Fed. CXL.

cause pending in the Supreme Court of the United States or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States. . . .

From appropriation act Mar. 3, 1877, c. 105, 19 Stat. 344, U. S. Comp. Stat. 1901, p. 705.

The first appropriation made by Congress to pay the expenses of printing the records of the Supreme court was made in 1834.² Since that time and until the passage of the above section the printing had been done by the government without charge to the litigants.³ Where one of the parties causes the record to be printed it may be charged as costs if the expense is no greater than if it had been done at the government printing office.⁴

§ 1850. — Supreme Court rule as to cost of printing.

In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

Clause 7 of Supreme court rule 10, promulgated as amended Jan. 4, 1884.

This provision is modified pro tanto by an amendment of 1887 to the 9th paragraph of rule 10 to the effect that "If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper."⁷

§ 1851. Costs on modification—unnecessary matter.

Upon modification of a judgment by the appellate court costs will be taxed as may seem fair and just to the court.^[a] Costs of irrelevant and unnecessary matter in the printed record will be taxed to the party in fault.^[b]

Author's text.

[a] Costs on modification of judgment.

In a collision case where the lower court fixed the blame entirely on one vessel and the appellate court found both vessels to blame, the appellants were given full costs in the upper court and the costs below were equally divided.¹⁰ Where, however, a decree is modified only in a minor particu-

²Act June 27, 1834, c. 92, 4 Stat.

695.

³Railroad Co. v. Collector, 96 U.

S. 594, 24 L. ed. 825.

⁴Idem.

⁷See post, § 1991, 120 U. S. 785.

¹⁰The Horace B. Parker, 76 Fed.

238, 22 C. C. A. 418.

lar, neither party is entitled to costs.¹¹ On the other hand in case of an appeal which substantially prevails, as where the decree is reversed as to the most important point, the appellant is entitled to costs.¹² Where the decree of the lower court is broader than the findings the appellate court may correct the same of its own motion and no costs will be allowed either party since it is the duty of the complainants attorney to draw out a proper decree.¹³

[b] Costs as to matter in record.

Where the printed record on appeal is useless¹⁴ or unnecessarily long the cost of the unnecessary matter will be taxed against the party at fault, whether he be successful or not.¹⁵ Where it does not appear who is responsible the facts on that point may be presented to the appellate court by affidavit or other proof so that the unnecessary costs may be taxed to the proper party.¹⁶ So where costs are enhanced by the actions of a party, without adequate cause such party should be taxed for the excess.¹⁷ Likewise costs will not be allowed for irrelevant matter introduced into the record.¹⁸ Thus, where a motion for a new trial made in the lower court is set forth in the record on appeal the costs of printing such motion, and the order denying it, will not be allowed, since an order denying such a motion is not reviewable on appeal and hence is immaterial to the case.¹⁹

§ 1852. Costs on appeal to be inserted in mandate.

When costs are allowed in this court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

Clause 6 of 24th Supreme court rule² and clause 5 of rule 31 of circuit courts of appeals in force in all circuits.

¹¹New England, etc. R. Co. v. Carnegie, etc. Co. 75 Fed. 59, 21 C. C. A. 219; Packard v. Lacing-Stud Co. 70 Fed. 68, 16 C. C. A. 639.

¹²Northern Trust Co. v. Snyder, 77 Fed. 820, 23 C. C. A. 480.

¹³Shute v. Morley, etc. Machine Co. 64 Fed. 368, 12 C. C. A. 356; Blair, etc. Co. v. Eastman, etc. Co. 64 Fed. 491, 12 C. C. A. 603.

¹⁴DeGroot v. United States, 5 Wall. 427, 18 L. ed. 700.

¹⁵Ball & Socket, etc. Co. v. Kraetzer, 150 U. S. 118, 37 L. ed. 1019, 14 Sup. Ct. Rep. 48; Railroad Co. v. Stewart, 95 U. S. 279, 24 L. ed. 431; United States Sugar Refinery v.

Providence, etc. Co. 62 Fed. 375, 10 C. C. A. 422; The Sarah, 52 Fed. 233, 3 C. C. A. 56; and see Ecaubert v. Appleton, 67 Fed. 918, 15 C. C. A. 73. See special rule on this point C. C. A. 7th circuit, rule 10. clause 4.

¹⁶United States Sugar Refinery v. Providence, etc. Co. 62 Fed. 375, 10 C. C. A. 422.

¹⁷American, etc. Co. v. Farmers Loan, etc. Co. 91 Fed. 565, 34 C. C. A. 7.

¹⁸Eastman Co. v. Getz, 84 Fed. 462, 28 C. C. A. 459.

¹⁹Nederland, etc. Ins. Co. v. Huel, 86 Fed. 741, 30 C. C. A. 363.

²¹How. XVI. 90 Fed.

§ 1853. — rule in circuit court of appeals.

The rule in the various circuits is in substance much the same and based upon the Supreme Court rule given in the preceding section.³ In the first circuit the rule is precisely the same⁴ and in the others differs but slightly.^[a]

Author's section.

[a] Second, third and eighth circuits.

"In case of reversal, affirmance, or dismissal with costs the amount paid for printing the record shall be taxed against the party against whom costs are given."⁵

[b] Fourth circuit.

"In case of reversal, affirmance or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given."⁶

[c] Fifth and seventh circuits.

"In case of reversal, affirmance, or dismissal with costs, the amount of the costs of the printing of the record and of the clerks fees for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process."⁷

[d] Sixth circuit.

"In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process."⁸

[e] Ninth circuit.

"In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record, and of the clerk's fee, shall be taxed against the party against whom costs are given."⁹

³Ante, § 1852.

⁴Par. 9, C. C. A. rule 23, first circuit.

⁵C. C. A. rule 23, 2d and 3rd circuits. Par. 5, C. C. A. rule 23, 8th circuit.

⁶Par. 5, C. C. A. rule 23, 4th circuit.

cuit, as amended May 19, 1898.

⁷Par. 6, C. C. A. rule 23, 5th and 7th circuit.

⁸Par. 5, C. C. A. rule 23, 6th circuit.

⁹Par. 6, C. C. A. rule 23, 9th circuit.

§ 1854. — printing briefs and opinions as taxable costs.

The rules in some of the circuits expressly provide that the cost of printing briefs or of printing the court's opinion shall be taxable costs.¹⁰

Author's section.

The fifteenth admiralty rule in second circuit makes "the reasonable expense of printing briefs" an "item of taxable costs."

¹⁰Eng. Adm. rule XV., 2nd circuit; clause 4, C. C. A. rule 28, 6th circuit, clause 1, rule 28, C. C. A. 4th circuit, as amended Oct. 22, 1894. See post, as amended May 29, 1896. Compare § 2108.[c]-[d]

CHAPTER 56.

JUDGMENT AND EXECUTION.

- § 1858. Amount of judgment for sum due in equity on bonds, etc.
- § 1859. Interest on judgments.
- § 1860. —on judgments against United States in Court of Claims.
- § 1861. Lien and record of judgments.
- § 1862. —liens for same period as State judgments.
- § 1863. —as to record in Louisiana county.
- § 1864. —unaffected by creation of new district in California.
- § 1865. Executions run in all districts of State.
- § 1866. Stay for purpose of moving new trial and grant thereof.
- § 1867. —stay when granted by State laws.
- § 1868. Execution against revenue officers when withheld.
- § 1869. Sale of real property under order or decree.
- § 1870. —sale of personal property.
- § 1871. —notice of sale of realty.
- § 1872. —effect of marshal's death after levy or sale.
- § 1873. State laws as to appraisal before sale apply to Federal courts—
procedure.
- § 1874. Execution from State courts against national banks restricted.

§ 1858. Amount of judgment for sum due in equity on bonds, etc.

In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity.^[a] And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by the jury.^[b]

R. S. § 961, U. S. Comp. Stat. 1901, p. 699.

[a] Application of section.

The section was carried into the Revised Statutes from the judiciary act of 1789.¹ The rule set forth therein is to be applied generally in proper

¹Act Sept. 24, 1879, c. 20, § 26, 1
Stat. 87.

cases in the courts of the United States,² it being the duty of such courts to give effect to the plainly expressed will of the contracting parties.³ But the section does not apply in cases heard on agreed facts or tried upon pleadings and proofs,⁴ nor in cases of judgment on a verdict,⁵ nor was it intended to enlarge the liability of a surety on official bonds.⁶

[b] Ascertaining amount due.

Where the sum is certain, as where the suit is on a promissory note, the computation may be made by the court,⁸ or by the clerk.⁹ The court also may compute the amount where the sum is uncertain and neither party requests a jury.¹⁰ But in such cases where a jury is requested, the court may either direct a writ of inquiry or swear a jury immediately to ascertain the sum justly due the plaintiff.¹¹

§ 1859. Interest on judgments.

Interest shall be allowed on all judgments^{[a]-[b]} in civil causes^[c] recovered in a circuit or district court,^[d] and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State.^[e]

R. S. § 966, U. S. Comp. Stat. 1901, p. 700.

[a] Purpose and scope of sections.

Rules of the Supreme court and of the circuit court of appeals as to the allowance of interest on judgments are given in a following section.¹⁵ The above section was carried into the Revised Statutes from an act of 1842.¹⁶ Its purpose was to bring about uniformity between the Federal and State tribunals on the subject of interest.¹⁷ The matter of giving interest being regulated purely by statute the courts are bound to give or withhold inter-

²The S. Oteri, 67 Fed. 151, 14 C. C. A. 344.

³Sun Printing, etc. Ass'n v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 234.

⁴Farrar v. United States, 5 Pet. 385, 8 L. ed. 165; Ives v. Merchants Bank, 12 How. 164, 13 L. ed. 938.

⁵Farrar v. United States, 5 Pet. 386, 8 L. ed. 165.

⁶United States v. Hills, 4 Cliff. 618, Fed. Cas. No. 15,369.

⁸Gurney v. Hoge, 6 Blatchf. 499, Fed. Cas. No. 5,875; Aurora v. West, 7 Wall. 82, 19 L. ed. 42.

⁹Aurora v. West, 7 Wall. 82, 19 L. ed. 42.

¹⁰Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Gurney v. Hoge, 6 Blatchf. 499, Fed. Cas. No. 5,875.

¹¹Gurney v. Hoge, 5 Blatchf. 499, Fed. Cas. No. 5,875.

¹⁵See post, § 2124.

¹⁶Act Aug. 23, 1842, c. 188 § 8, 5 Stat. 518.

¹⁷Railroad v. Harmon, 147 U. S. 586, 37 L. ed. 290, 13 Sup. Ct. Rep. 557.

est as the statute directs.¹⁸ While the section provides only for interest on judgments it does not exclude the idea of a power in the several states to allow interest on verdicts and where such allowance is expressly made by a State statute, it is a right of which the plaintiff ought not be deprived, on removal of the cause to a Federal court.¹⁹

[b] All judgments.

Claims proved to the satisfaction of the comptroller of the Treasury³ are of the same efficacy as judgments and bear interest.⁴ Likewise upon a revivor of judgment by a writ of scire facias, the order should award execution for the original amount of the judgment and interest.⁵ So also, interest should be allowed for the time a writ of error is pending,⁶ and for the delay caused by a stay of proceeding, during the pending of a motion for a new trial.⁷

[c] At law only.

The section provides for the payment of interest on judgments at law only and hence decrees in equity of the circuit and district courts are not included.¹⁰

[d] — applies to circuit and district courts only.

Being confined in terms to the circuit and district courts¹¹ provisions of the above section do not apply to judgments or decree of the Federal Supreme court,¹² or of the Supreme court of the district of Columbia.¹³

[e] Interest to be calculated from date of judgment.

Since interest is to be calculated from the date of the judgment, a change of the State law as to interest operates only prospectively, and upon award of an execution the interest should be included at the rate obtained at the time judgment was rendered.¹⁵

§ 1860. — on judgments against United States in Court of Claims.

. . . From the date of such final judgment or decree [i. e.,

¹⁸United States v. Verdier, 164 U. S. 218, 41 L. ed. 409, 17 Sup. Ct. Rep. 42; see also Henry v. Travelers Ins. Co. 42 Fed. 363.

¹⁹Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 34 L. ed. 835, 11 Sup. Ct. Rep. 234.

³R. S. § 5236, U. S. Comp. Stat. 1901, p. 3508.

⁴National Bank v. Mechanics, etc. Bank, 94 U. S. 437, 24 L. ed. 176.

⁵Grantland v. Memphis, 12 Fed. 287.

⁶Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827.

⁷Gunther v. Insurance Co. 10 Fed. 830, 20 Blatchf. 390.

¹⁰Hagerman v. Moran, 75 Fed. 97, 21 C. C. A. 242; see also Perkins v. Fourniquet, 14 How. 331, 14 L. ed. 444.

¹¹Hagerman v. Moran, 75 Fed. 97, 21 C. C. A. 242; Perkins v. Fourniquet, 14 How. 331, 14 L. ed. 444.

¹²Perkins v. Fourniquet, 14 How. 331, 14 L. ed. 444.

¹³Washington, etc. Railroad v. Harmon, 147 U. S. 586, 37 L. ed. 291, 13 Sup. Ct. Rep. 557; but see Woodbury v. D. C. 8 Mackey, 157.

¹⁵Texas, etc. Railway v. Anderson, 149 U. S. 242, 37 L. ed. 719, 13 Sup. Ct. Rep. 843.

against the United States in Court of Claims] interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

Last part of § 10, act Mar. 3, 1887, chap. 359, 24 Stat. 307, U. S. Comp. Stat. 1901, p. 756.

§ 1861. Lien and record of judgments.

Judgment and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: Provided, That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed or any other thing to be done, in a particular manner, or in a certain office or county or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

§ 1, of act Aug. 1, 1888, c. 729, 25 Stat. 357, U. S. Comp. Stat. 1901, p. 701.

The object of the above section was to make the lien of a judgment of a Federal court and that of the judgment of the particular State court as nearly co-extensive, as regards territorial jurisdiction, as possible.¹⁹ Prior to its enactment the Supreme Court decided that the lien of a judgment of a Federal court was co-extensive with the jurisdiction of such court.²⁰ This rule resulted in giving suitors in the Federal court a preference over those of the State court as to the territorial extent of the lien.¹ The above enactment however only partially remedied this defect since the former rule, that the judgment lien of a Federal court is co-extensive with the jurisdiction of such court, still exists where the State court has not provided for the filing and docketing of a transcript of the Federal judgment which creates the lien.² But where the State law provides for the

¹⁹Dartmouth, etc. Bank v. Bates, 44 Fed. 546.

¹Dartmouth, etc. Bank v. Bates, 44 Fed. 547.

²⁰Massingill v. Downs, 7 How. 760, 12 L. ed. 903; Brown v. Pierce, 7 Wall. 217, 19 L. ed. 138.

²Dartmouth, etc. Bank v. Bates, 44 Fed. 546.

docketing, etc., of the Federal judgment such judgment is a lien to the same extent and under the same conditions as if rendered by a State court of general jurisdiction.³

§ 1862. — liens for same period as State judgments.

Judgments and decrees rendered in a circuit or district court within any State shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon.

R. S. § 967, U. S. Comp. Stat. 1901, p. 700.

The section was originally enacted in 1840.⁷ It was early decided that Congress in adopting the processes of the States,⁸ also adopted the mode of process prevailing at that date in the courts of the several States in respect to the liens of judgments within the respective jurisdictions,⁹ and the question as to the duration of such liens was settled by the above enactment.¹⁰ Under it, judgments recovered in the Federal courts are liens in all cases where they would be by the laws of the particular State.¹¹ The proposition seems established however that where Congress adopts the laws of the particular State, as the laws governing the Federal courts in that state, the rights given thereunder are not divested by a noncompliance with the conditions, restrictions or limitations contained in such state laws, if compliance with the latter would depend upon a resort to State officials or the State judiciary.¹² Thus a condition in a State law which allows a suspension of the judgment lien on giving security on appeal, does not apply in the Federal court,¹³ nor does a proviso that a judgment shall not be a lien unless it be docketed in the county where the land lies.¹⁴ But the statutory limit as to the duration of the judgment lien is fixed by the State statute and the Federal courts cannot extend it.¹⁵

§ 1863. — as to record in Louisiana county.

Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or de-

³Dartmouth, etc. Bank v. Bates, 44 Fed. 546.

⁷Act July 4, 1840, c. 43, § 4, 5 Stat. 393.

⁸See ante, § 900.

⁹Brown v. Pierce, 7 Wall. 217, 19 L. ed. 138; see also Dartmouth, etc. Bank v. Bates, 44 Fed. 547.

¹⁰Dartmouth, etc. Bank v. Bates, 44 Fed. 547.

¹¹Cooke v. Avery, 147 U. S. 387, 37 L. ed. 214, 13 Sup. Ct. Rep. 340.

¹²United States v. Humphreys, 3 Hughes, 201, Fed. Cas. No. 15,422; and see Carroll v. Watkins, 1 Abb. 474, Fed. Cas. No. 2,457; Massengill v. Downs, 7 How. 760, 12 L. ed. 903.

¹³Myers v. Tyson, 13 Blatchf. 242, Fed. Cas. No. 9,995.

¹⁴United States v. Humphreys, 3 Hughes, 201, Fed. Cas. No. 15,422. See, however, § 1861, ante.

¹⁵Savings, etc. Co. v. Bear Valley, etc. Co. 89 Fed. 32.

decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish.

§ 3, act Aug. 1, 1888, c. 729, 25 Stat. 358, as amended by act Mar. 2, 1895, c. 180, 28 Stat. 814, U. S. Comp. Stat. 1901, p. 701.

The amendment of 1895 consisted in adding everything after the words "such judgment or decree may be a lien," etc.

§ 1864. — unaffected by creation of new district in California.

The passage of this act [i. e., to create the United States judicial district of Southern California] shall not have the effect to destroy or impair the lien of any judgment or decree rendered in the circuit or district court of the United States for the present district of California prior to this act taking effect; and final process on any judgment or decree entered in the circuit or district court of the United States for the district of California, or which shall be entered therein prior to this act taking effect, and all other process for the enforcement of any order of said courts, respectively, in any cause or proceeding now pending therein except on proceedings removed as herein provided, shall be issued and made returnable to the proper court for the said northern district of California, and may be directed to and executed by the marshal of the United States for the said northern district in any part of the State of California.

§ 6 of act Aug. 5, 1886, c. 928, 24 Stat. 309, U. S. Comp. Stat. 1901, p. 325.

While there are numerous statutes changing old districts and creating new ones, this seems the only instance in which a provision like the above has been included.

§ 1865. Executions run in all districts of State.

All writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

R. S. § 985, U. S. Comp. Stat. 1901, p. 707.

The above section was carried into the Revised Statutes from an act of

1826.¹ It gives to the judgment plaintiff a right to concurrent execution all over the State.² But its provisions do not give a corporation complainant the right to bring suit in a district in which it is a nonresident without giving security for costs as required by State statutes adopted by the rules of the court.³

§ 1866. Stay for purpose of moving new trial and grant thereof.

When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void.

R. S. § 987 U. S. Comp. Stat. 1901, p. 708.

The scope of this section is limited in terms to cases where there has been either a verdict or a finding of the court upon the facts. Hence where a case has been decided by a referee by consent, the report of the referee to have the same effect as a judgment of the court, the court has no authority to grant a motion for a stay of proceedings under this section.⁶ The section relates only to the method of staying execution and does not limit the time in which motions for a new trial may be otherwise filed.⁷ A judgment pending motion to stay execution is not final, for the purpose of taking out a writ of error.⁸

§ 1867. — stay when granted by State laws.

In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to stay of execution for one term

¹Act May 20, 1826, c. 124, 4 Stat. 184.

²Prevost v. Gorrell, 25 Pittsb. L. J. 125, Fed. Cas. No. 11,402; see also Treadwell v. Seymour, 41 Fed. 579.

³Lyman, etc. Co. v. Southard, 12 Blatchf. 405, Fed. Cas. No. 8,633.

⁶Neafie v. Cheesebrough, 14 Blatchf. 313, Fed. Cas. No. 10,064; and see Fourth Nat. Bank v. Neyhardt, 13

Fed. Proc.—94.

Blatchf. 393, Fed. Cas. No. 4,991; but see Robinson v. Mutual, etc. Ins. Co. 16 Blatchf. 194, Fed. Cas. No. 11,961.

⁷Felton v. Spiro, 78 Fed. 581, 24 C. C. A. 321; see also Rutherford v. Penn etc. Ins. Co. 1 Fed. 456, 1 McCrary, 120.

⁸Kingman v. Western Mfg. Co. 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

or more, defendants in actions in the courts of the United States, held herein, shall be entitled to a stay of execution for one term.

R. S. § 988, U. S. Comp. Stat. 1901, p. 708.

The section was enacted in 1828.¹⁰

§ 1868. Execution against revenue officers when withheld.

When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury.

R. S. § 989, U. S. Comp. Stat. 1901, p. 708.

The above section was originally enacted in 1863.¹⁴ Its provisions relating to the withholding of executions and payment of judgments against revenue officers, are made applicable to actions against officers of either House of Congress by act of 1875.¹⁵ The effect of the provision, where a certificate is given, is practically to convert the suit against the officer into a claim against the United States.¹⁶ The certificate of probable cause may be granted by another judge than the one before whom the judgment was rendered,¹⁷ and after an execution has issued as well as before.¹⁸ The certificate must be granted before the liability of the government begins.¹⁹ Where the court grants a certificate of probable cause as provided in this section, and the judgment is rendered against the officer, the amount payable out of the treasury does not include interest accrued before judgment.¹ And it has been held that the amount payable should not include interest at all.²

¹⁰Act May 19, 1828, c. 68, § 2, 4 Fed. Cas. No. 3,300. Stat. 281.

¹⁴Act March 3, 1863, c. 76, § 12, 12 Fed. Cas. No. 3,300.

Stat. 741. ¹⁹White v. Arthur, 10 Fed. 83, 20

¹⁵See act March 3, 1875, c. 130, § 8; ante, § 525. Blatchf. 237; see also United States v. Sherman, 98 U. S. 565, 25 L. ed.

¹⁶United States v. Sherman, 98 U. 235. ¹United States v. Sherman, 98 U. S. 565, 25 L. ed. 235; Hedden v. Ise-

lin, 31 Fed. 269, 24 Blatchf. 455. ²White v. Arthur, 10 Fed. 81.

¹⁷Cox v. Blarney, 14 Blatchf. 289,

§ 1869. Sale of real property under order or decree.

All real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

§ 1 of act Mar. 3, 1893, c. 225, 27 Stat. 751, U. S. Comp. Stat. 1901, p. 710.

§ 1870. — sale of personal property.

All personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner.

§ 2 of act Mar. 3, 1893, c. 225, 27 Stat. 751, U. S. Comp. Stat. 1901, p. 710.

§ 1871. — notice of sale of realty.

Hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or State, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper.

§ 3 of act Mar. 3, 1893, c. 225, 27 Stat. 751, U. S. Comp. Stat. 1901, p. 710.

The act is prospective and not retrospective.⁷ Its provisions should be complied with strictly. Thus the provision that publication should be made for at least four weeks is not complied with by a publication for twenty-seven days.⁸ But the provision as to publication being for the protection of the judgment defendant may be waived by him.⁹ And in

⁷Central Trust Co. v. Sheffield, etc. Co. 60 Fed. 16.

⁹Nevada, etc. Syndicate v. National Nickel Co. 103 Fed. 391.

⁸Wilson v. Northwestern, etc. Ins. Co. 65 Fed. 38, 12 C. C. A. 505.

general, mere errors in a decree in directing the manner of the sale of property do not make the decree void but voidable only,¹⁰ and such errors or irregularities in such sale afford no ground for setting aside the decree after confirmation had upon due notice to the defendant and without objection.¹¹

§ 1872. — effect of marshal's death after levy or sale.

When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase money and costs remaining unpaid.

R. S. § 994, U. S. Comp. Stat. 1901, p. 711.

The above section was originally enacted in 1800.¹² The judiciary act of 1789 provides that marshals, when removed or when their office expires may execute any process in their hands,¹⁴ and it is held that the above section does not repeal that provision but merely confers on the new marshal the power to do the same acts. Hence a sale by a marshal after he is removed from office is not void, but if confirmed by the court and a deed ordered, is valid.¹⁵ The court has power to order a marshal, whose time has expired, to amend his return upon an execution so as to furnish his successor with a description of the land levied upon so that the latter may execute a valid deed to the purchaser.¹⁶

¹⁰Godcheaux v. Morris, 121 Fed. 482, 57 C. C. A. 434.

¹¹Nevada, etc. Syndicate v. National Nickel Co. 103 Fed. 391.

¹²Act May 7, 1800, c. 45, 2 Stat. 61.

¹⁴R. S. § 790; see ante, § 642.

¹⁵Doolittle v. Bryan, 14 How. 566, 14 L. ed. 544. But see United States

v. Arkansas, etc. Bank, Hempst. 460; Overton v. Gorham, 2 McLean, 509, Fed. Cas. No. 10,626.

¹⁶Ex parte Worley, 19 Fed. 536.

§ 1873. State laws as to appraisal before sale apply to Federal courts—procedure.

When it is required by the laws of any State that goods taken in execution on a writ of fieri facias shall be appraised, before the sale thereof, the appraisers appointed under the authority of the State may appraise goods taken in execution on a fieri facias issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such State. And the marshal in whose custody such goods may be, shall summon the appraisers, in the same manner as the sheriff is, by the laws of such State, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisement under the laws of the State.

R. S. § 993, U. S. Comp. Stat. 1901, p. 709.

The section was carried into the Revised Statutes from an act of 1793.¹⁹

§ 1874. Execution from State courts against national banks restricted.

No . . . execution shall be issued against such association [a national bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Part of R. S. § 5242, U. S. Comp. Stat. 1901, p. 3517.

¹⁹Act March 2, 1793, c. 22, § 8,

¹ Stat. 335.

CHAPTER 57.

APPEAL AND ERROR IN GENERAL—TIME OF TAKING.

- § 1885. Distinction between modes of reviewing law and equity cases.
- § 1886. Supreme Court practice modeled upon that of Kings Bench.
- § 1887. Supreme Court practice followed in circuit court of appeals.
- § 1888. Same rules govern writ of error to State courts as to lower Federal courts.
- § 1889. Procedure on appeal from United States court in China.
- § 1890. Existing rules of review applicable to review under circuit court of appeals act.
- § 1891. Mode of appeal from district courts acting as circuit courts.
- § 1892. Right and mode of appeal in suits in Court of Claims under act of 1887.
- § 1893. Procedure on appeal and error from Alaska District court.
- § 1894. Whether review from Territorial courts by writ of error or appeal—procedure.
- § 1895. Death of party after final judgment below—appeal by representative.
- § 1896. Death pending appeal to Supreme court and procedure.
- § 1897. —case to abate when.
- § 1898. —procedure where representative resides outside jurisdiction of trial court.
- § 1899. Death pending appeal to circuit court of appeals and procedure.
- § 1900. —case to abate when.
- § 1901. —procedure where representative resides outside jurisdiction of trial court.
- § 1902. Time for taking appeal or writ of error to Supreme Court.
- § 1903. Prize cases to be appealed within thirty days.
- § 1904. Time for appeal from circuit court of appeals to Supreme Court.
- § 1905. Time within which appeals to circuit court of appeals to be taken.
- § 1906. —from interlocutory injunction or receivership order.
- § 1907. Time and manner of appeal from Court of Claims.
- § 1908. —when limitation of time ceases to run.
- § 1909. —time for appeal under act of 1887.
- § 1910. Anti-trust cases must be appealed within sixty days.
- § 1911. Time for appeal from Alaska District Court.
- § 1912. Time for direct appeals to Supreme Court from Indian Territory.
- § 1913. Time for appeals in revenue cases from board of appraisers.
- § 1914. Time for writ of error in capital cases.
- § 1915. —for appeal on injunction in Commerce Commission cases.
- § 1916. Parties on appeal where judgment or decree is joint.

§ 1885. Distinction between modes of reviewing law and equity cases.

Just as Federal practice distinguishes sharply between law and equity in the trial of causes,¹ so the same distinction is to be found in the modes of review. Cases at law are reviewable by writ of error, and cases in equity by appeal. So strongly is this principle established that the courts have, on more than one occasion, refused to countenance a construction of some act of Congress whose language might fairly enough have been construed as a departure from it.

Author's section.

A provision of the bankrupt act regarding "appeal" was recently construed to mean writ of error in view of the nature of the proceeding to be reviewed;² and the act providing for appeals from the Territorial courts and declaring the proper mode to be writ of error "in cases of trial by jury" was held to mean not only cases where a jury was actually had but also all cases in which trial by jury might have been had—in other words, cases at law.³ Writ of error is the proper method of reviewing alleged errors committed in an action at law,⁴ while appeal is the only method of reviewing an equity decree.⁵ Where it is doubtful which is the proper remedy the practice of taking both an appeal and a writ of error is to be commended.⁶

§ 1886. Supreme Court practice modeled upon that of Kings Bench.

This court considers the former practice of the court of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

Third Supreme Court Rule as revised and corrected Dec. term, 1858.¹⁰

Federal courts will follow the rules of admiralty and equity courts of England except where they would be injurious or impracticable.¹¹

¹See ante, § 800.

²Elliot v. Toeppner, 187 U. S. Fed. 711, 71 C. C. A. 127; Files 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133.

³Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324; Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210; Guss v. Nelson, 200 U. S. 298, 50 L. ed. 489, 26 Sup. Ct. Rep. 260; National L. S. Bk. v. First Nat. Bk. 203 U. S. —, 51 L. ed. (adv. op. p. 79).

⁴Roberts v. Great Northern Ry. 138

403.

⁵Files v. Brown, 124 Fed. 133, 59 C. C. A. 403.

⁶Lockman v. Lang, 132 Fed. 3, 65 C. C. A. 621, and cases cited.

¹⁰21How. v.

¹¹Florida v. Georgia, 17 How. 492, 15 L. ed. 181; California v. Southern Pac. Co. 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 599; Rhode Island

§ 1887. Supreme Court practice followed in circuit court of appeals.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

Circuit court of appeals rule 8, in force in all circuits.

Under this rule, equity rule 90¹⁴ is adopted.¹⁵

§ 1888. Same rules govern writ of error to State courts as to lower Federal courts.

Writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.^{[a]-[b]}

R. S. § 1003, U. S. Comp. Stat. 1901, p. 713.

[a] Who can apply for writ of error.

A judgment of a State court cannot be reviewed by the Supreme Court unless the Federal question involved is personal to the plaintiff in error.¹ Hence a stranger to a contract cannot raise the question of its impairment for the purpose of creating a Federal question.² So also in a suit against a railroad company and trustees of a mortgage given by it, the railroad may alone appeal in being the only real party.³

[b] —by whom issued.

The "court of the United States" mentioned in the above section refers to the circuit and district courts.⁶ The writ may be issued by the clerk of the circuit court⁷ in the State to whose court it is directed,⁸ or it may be issued by the clerk of the supreme court.⁹ Since all process from the supreme or circuit court must bear the teste of the chief justice of the United States,¹⁰ a writ of error to a State court which fails to bear such

v. Massachusetts, 14 Pet. 257, 10 L. ed. 423.

¹⁴Ante, § 937.

¹⁵Richmond v. Atwood, 52 Fed. 10, 2 C. C. A. 596, 17 L.R.A. 615.

¹Texas, etc. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; Hale v. Gaines, 22 How. 160, 16 L. ed. 269; Long v. Converse, 91 U. S. 114, 23 L. ed. 235; Miller v. Lancaster Bank, 106 U. S. 544, 27 L. ed. 290, 1 Sup. Ct. Rep. 538; Giles v. Little, 134 U. S. 650, 33 L. ed. 1064, 10 Sup. Ct. Rep. 625.

²Phinney v. Sheppard Hospital, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct.

Rep. 573; Williams v. Eggleston, 170 U. S. 308, 42 L. ed. 1049, 18 Sup. Ct. Rep. 617.

³Norwich, etc. R. Co. v. Johnson, 15 Wall. 8, 21 L. ed. 118.

⁶Allen v. Southern Pac. Co. 173 U. S. 479, 43 L. ed. 779, 19 Sup. Ct. Rep. 518.

⁷See post, § 1925.

⁸See Buel v. Van Ness, 8 Wheat. 312, 5 L. ed. 624.

⁹See Ex parte Ralston, 119 U. S. 614, 30 L. ed. 506, 7 Sup. Ct. Rep. 317.

¹⁰See ante, § 836.

teste will be dismissed.¹¹ Hence a writ of error issued by a clerk of the state court bearing the teste of the chief justice of the state is wholly insufficient to give jurisdiction.¹² But where the writ is properly allowed and tested it is questionable whether the fact that it is signed by the clerk of the State court instead of by the clerk of the supreme or circuit court is sufficient to invalidate it.¹³

[c] — to what court directed.

The writ of error may be directed to any State court in which the record and judgment may be found.¹⁷ Hence it lies to a lower court when the record remains there and the judgment has to be entered there.¹⁸ The rule apparently is that if the highest court, has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior court for safe keeping, the writ may issue either to the highest court or to the inferior court. If the highest court in obedience to the writ procures a return of the record and judgment from the inferior court and makes a return thereof to the supreme court, no further writ is necessary. If it fails to do this a writ may be sent direct to the inferior court.¹⁹ Where, however, the law requires the highest court to retain its own record the writ should be directed to that court alone, it being the only one authorized to certify the record to the supreme court.²⁰

[d] Allowance.

Writ of error to a state court must be allowed by the chief justice of the State court or by a justice of the supreme court,⁴ and where there is no such allowance the writ will be dismissed.⁵ It does not issue as of right, and upon application to the supreme court for the writ, the court should refuse to allow it where the decision of the Federal question complained of was plainly correct.⁶ As a matter of practice an application to the supreme court for a writ to a state court will not be entertained unless at the request of a member of the court with the concurrence of his associates.⁷

¹¹*Germain v. Mason*, 154 U. S. 588, 20 L. ed. 689, 14 Sup. Ct. Rep. 1170.

¹²*Bondurant v. Watson*, 103 U. S. 280, 26 L. ed. 447.

¹³*Miller v. Texas*, 153 U. S. 537, 38 L. ed. 813, 14 Sup. Ct. Rep. 874.

¹⁷*Gilston v. Hoyt*, 3 Wheat. 303, 4 L. ed. 381; *Webster v. Reid*, 11 How. 457, 13 L. ed. 769; *Polleys v. Black River, etc. Co.* 113 U. S. 82, 28 L. ed. 938, 5 Sup. Ct. Rep. 370; *Lee v. Johnson*, 116 U. S. 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

¹⁸*Wedding v. Meyler*, 192 U. S. 573, 48 L. ed. 570, 24 Sup. Ct. Rep. 322.

¹⁹*Atherton v. Fowler*, 91 U. S. 148, 23 L. ed. 267.

²⁰*Atherton v. Fowler*, 91 U. S. 148, 23 L. ed. 267.

⁴*Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730; *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792.

⁵*Northwestern Packet Co. v. Home Ins. Co.* 154 U. S. 588, 20 L. ed. 463, 14 Sup. Ct. Rep. 1168; *Callan v. May*, 2 Black, 543, 17 L. ed. 281; *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. ed. 223.

⁶*Spies v. Illinois*, 123 U. S. 164, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; see also *Twitchell v. The Commonwealth*, 7 Wall. 321, 19 L. ed. 223.

⁷*In re Robertson*, 156 U. S. 184, 39 L. ed. 389, 15 Sup. Ct. Rep. 324.

§ 1889. Procedure on appeal from United States court in China.

Said appeals or writs of error [i. e., from the court in China¹⁰] shall be regulated by the procedure governing appeals within the United States from the district courts to the circuit courts of appeal, and from the circuit courts of appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable.

Part of § 3, act June 30, 1906, c. 3934, 34 Stat. 815.

§ 1890. Existing rules of review applicable to review under circuit court of appeals act.

All provisions of law now in force regulating the method and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect to the circuit courts of appeals,^[a] including all provisions for bonds or other securities to be required and taken on such appeals and writs of error,^[b] and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

Part of § 11, act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

[a] Law in force at time of enactment as to methods of review, adopted.

The first portion of the above section, here omitted, provides for the time of appeal.¹⁴ Since the law in force is adopted by this section, the power to amend a writ of error as conferred by the Revised Statutes¹⁵ is conferred by this section in the circuit court of appeals.¹⁶ Hence the court may affix its seal to a writ of error, formal in all respects save the absence of seal.¹⁷ So also a writ of error returnable to the circuit court of appeals may be issued from the clerk's office of the circuit court in which the case was tried under Revised Statutes, § 1004.¹⁸ Likewise the rule that the decision of the circuit and district courts on motion for a new trial is not reviewable is applicable to the circuit court of appeals.¹⁹ But the

¹⁰See ante, §§ 64 and 87, where the Hopewell, 51 Fed. 798, 2 C. C. A. 510.
section appears in full.

¹⁴Post, § 1905.

¹⁵See post, § 1928.

¹⁶Cotter v. Railroad, 61 Fed. 747, 10 C. C. A. 35; see also Alaska, etc. Mining Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655; United States v. Fed. 830, 6 C. C. A. 602.

¹⁷Cotter v. Railroad, 61 Fed. 747, 10 C. C. A. 35.

¹⁸Northern Pac. R. Co. v. Amato, 49 Fed. 881, 1 C. C. A. 468; see post, § 1925.

¹⁹Alexander v. United States, 57

provision authorizing appeals from final decrees only when the sum in controversy is of a certain amount²⁰ does not apply, being expressly repealed by the act creating the circuit court of appeals.¹

The provisions of this section do not put in force in the circuit court of appeals the provisions of the Judiciary act of 1875, limiting the supreme court in admiralty appeals to a review of questions of law apparent on the record or presented by bill of exceptions. On such appeals, both from the district and circuit court the circuit court of appeals will try the case *de novo*,⁵ although it will follow the conclusions of the trial judge as to questions of fact unless based on evidence manifestly insufficient.⁶

[b] Law in force at time of enactment as to bonds and securities on appeal adopted.

Under this section the circuit court of appeals may exercise the same powers regarding admission to bail pending a writ of error as were formerly exercised in appellate criminal proceedings by the supreme court.⁹ So also the provisions of the Revised Statutes as to the giving of security on appeal are adopted by the provisions of this section.¹⁰

§ 1891. Mode of appeal from district courts acting as circuit courts.

Writs of error shall be prosecuted from the final judgments of district courts acting as circuit courts to the Supreme Court in the same manner as from the final judgment of circuit courts.

R. S. § 1002, U. S. Comp. Stat. 1901, p. 713.

The provisions conferring circuit court powers on district courts are repealed by an act of 1889,¹¹ and the above section has hence become inoperative.

§ 1892. Right and mode of appeal in suits in Court of Claims under act of 1887.

The plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in

²⁰R. S. § 691.

¹Northern Pac. R. Co. v. Amato, 49 Fed. 883, 1 C. C. A. 468; act March 3, 1891, c. 517, § 14.

⁵Pratt v. The Havilah, 48 Fed. 684, 1 C. C. A. 77; The State of California, 49 Fed. 172, 1 C. C. A. 224; The Philadelphian, 60 Fed. 423, 9 C. C. A. 54; The Coquitlam, 77 Fed. 744, 23 C. C. A. 438; but see Pioneer Fuel Co. v. McBrier, 84 Fed. 495, 28 C. C. A. 466.

⁶The Brandywine, 87 Fed. 652, 31 C. C. A. 187.

⁹McKnight v. United States, 113 Fed. 452, 51 C. C. A. 285; see also Hudson v. Parker, 156 U. S. 277, 39 L. ed. 424, 15 Sup. Ct. Rep. 450.

¹⁰The Presto, 93 Fed. 522, 35 C. C. A. 394.

¹¹Act Feb. 6, 1889, c. 113, § 5, U. S. Comp. Stat. 1901, p. 493.

that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

§ 9 of act Mar. 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

§ 1893. Procedure on appeal and error from Alaska District court.

All provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States circuit court of appeals for the ninth circuit, except in so far as the same may be inconsistent with any provision of this act [i. e., the Alaska code], shall regulate the procedure and practice in cases brought to the¹⁷ courts, respectively, from the district court for the district of Alaska.

Part of § 508, Alaska code, act June 6, 1900, c. 786, 31 Stat. 415.

§ 1894. Whether review from Territorial courts by writ of error or appeal—procedure.

The appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe. . . .

Part of § 2, act April 7, 1874, c. 80, 18 Stat. 27, U. S. Comp. Stat. 1901, p. —.

The above section also provides for a certified statement of the facts involved, to be made and sent up by the Territorial supreme court.¹ It also contains a provision temporary in character, saving from its operation cases pending at the time of its enactment. The appellate jurisdiction of the supreme court over the judgments and decrees of the Territorial courts in cases of trial by jury is to be exercised by a writ of error and in all other cases by appeal.² This is an enunciation of the familiar rule of

¹⁷So in the printed statutes.

¹See post, § 1961.

²Stringfellow v. Cain, 99 U. S. 611, 25 L. ed. 421; Canon v. Pratt, 99 U. S. 620, 25 L. ed. 447.

Federal practice that cases at law are reviewable only by writ of error. It means all cases triable by jury and whether a jury trial was actually had or no.³

§ 1895. Death of party after final judgment below—appeal by representative.

That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

§ 9 of act Mar. 3, 1875, c. 137, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 513.

Prior to the above enactment the practice was to make application to the court below for the purpose of reviving the suit in the name of the representative of the deceased.⁷ Where the plaintiff below was but a nominal party and the declaration shows the real party in interest a writ of error prosecuted by such real party has been allowed without formal proceedings for revivor.⁸

§ 1896. Death pending appeal to Supreme Court and procedure.

When ever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representa-

³City v. McMaster, 196 U. S. 529, 49 L. ed. 587, 25 Sup. Ct. Rep. 324, and see also footnote 3 under § 1885, ante.

⁷McClane v. Boon, 6 Wall. 246, 18 L. ed. 836.

⁸Amandeo v. Northern Ass'n Co. 201 U. S. 194, 50 L. ed. 722, 26 Sup. Ct. Rep. 507.

tive shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous; provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

First paragraph of supreme court rule 15, amended Dec. 11, 1879.¹⁰

Where one of three plaintiffs on a writ of error dies after the writ is issued it is not necessary to make his heirs and representatives parties to the writ.¹¹ So also on an appeal, where one of the appellants dies and his death is suggested under the above rule and an order issued for notice to his representatives, on failure of such representatives to appeal the suit shall proceed at the suit of the survivors.¹²

§ 1897. — case to abate when.

When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

Second paragraph of supreme court rule 15, originally promulgated Dec. term, 1851, revised and corrected Dec. term, 1858.¹⁵

Where the death of the complainant is suggested and for three years his legal representatives fail to appear the case will abate.¹⁶

§ 1898. — procedure where representative resides outside jurisdiction of trial court.

When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction

¹⁰100 U. S. IX.

¹¹McKenney v. Carroll, 12 Pet. 71, 9 L. ed. 1002.

¹²Moses v. Wooster, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 38.

¹⁵21 How. —.

¹⁶Barrebeau v. Brant, 17 How. 46, 15 L. ed. 34; see Phillips v. Preston, 11 How. 294, 13 L. ed. 702.

of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court supported by affidavit, that the said party was dead when the writ of error or appeal was sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the terms next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

Third paragraph of rule 15 of supreme court, promulgated Jan. 12, 1875.²⁰

§ 1899. Death pending appeal to circuit court of appeals and procedure.

Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record and, on hearing, have the judgment or decree reversed, if it be erroneous. Provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

Paragraph 1 of Rule 19, circuit court of appeals, in force in all circuits.

§ 1900. — case to abate when.

When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

Paragraph 2, of Rule 19, circuit court of appeals, in force in all circuits.

§ 1901. — procedure where representative resides outside jurisdiction of trial court.

When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may pro-

cure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within sixty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or district in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measure above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And Provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

Paragraph 3, of rule 19, circuit court of appeals, in force in all circuits.

§ 1902. Time for taking appeal or writ of error to Supreme Court.

No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought,^{[a]-[b]} or the appeal is taken^[c] within two years after the entry of such judgment, decree or order:^[d] Provided, That where a party entitled to prosecute a writ of error or to take an appeal

is an infant, insane person, or imprisoned, such writ of error may be prosecuted or such appeal may be taken, within two years after the judgment, decree or order, exclusive of the term of such disability.^[e]

R. S. § 1008, U. S. Comp. Stat. 1901, p. 715.

[a] Scope of section.

This section was originally enacted in 1872,⁵ and was not repealed by the circuit court of appeals act of 1891, abolishing the appellate jurisdiction of the circuit court.⁶ The time for writs of error or appeal from the district to the circuit court was one year.⁷ As R. S. § 1003⁸ provides for taking cases by writ of error from State courts in the same manner as from inferior Federal courts, the provision of this section are held applicable to writs of error to the State courts.⁹

[b] Writ of error when brought.

A writ of error is not brought within the legal meaning of the term until it is filed in the court which rendered the judgment.¹⁴ "It is the filing of the writ that removes the record from the inferior to the appellate court and the period of limitation prescribed by this act must be calculated accordingly."¹⁵ Hence the writ will be dismissed when allowed but not filed within the statutory period.¹⁶ But where the trial judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, the mere omission of the clerk of the trial court to indorse the writ of error as filed, the filing having actually been made, will not defeat the jurisdiction of the appellate court.¹⁷

⁵Act June 1, 1872, c. 255, § 2, 17 Stat. 196.

⁶See ante, § 77; *Allen v. Southern Pac. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; *Holt v. Indiana Mfg. Co.* 178 U. S. 168, 44 L. ed. 418, 20 Sup. Ct. Rep. 526.

⁷R. S. § 635.

⁸Ante, § 1889.

⁹*Polleys v. Black River Imp. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Scarborough v. Pargoud*, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Cummings v. Jones*, 104 U. S. 419, 26 L. ed. 824.

¹⁴*Scarborough v. Pargoud*, 108 U. S. 568, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *United States v. Baxter*, 51 Fed. 624, 2 C. C. A. 410; *Mussina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Brooks v. Norris*, 11 How. 204, 13 L. ed. 665; *Hudson v. Parker*, 156 U.

S. 288, 39 L. ed. 429, 15 Sup. Ct. Rep. 450.

¹⁵*Scarborough v. Pargoud*, 108 U. S. 568, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; see also *Credit Co. v. Arkansas, etc. Ry.* 128 U. S. 261, 32 L. ed. 450, 9 Sup. Ct. Rep. 107; *Polleys v. Black River Co.* 113 U. S. 83, 28 L. ed. 938, 5 Sup. Ct. Rep. 370; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Carroll v. Dorsey*, 20 How. 204, 15 L. ed. 803; *Cummings v. Jones*, 104 U. S. 419, 26 L. ed. 824; but see *Cincinnati, etc. Co. v. Deposit Co.* 146 U. S. 55, 36 L. ed. 886, 13 Sup. Ct. Rep. 14.

¹⁶*United States v. Baxter*, 51 Fed. 624, 2 C. C. A. 410; *City of Waxahachie v. Coler*, 92 Fed. 286, 34 C. C. A. 349.

¹⁷*Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906.

[c] Appeal when taken.

An appeal from a decree of the circuit court is not "taken" until it is in some way presented to the court which made the decree appealed from, so as to put an end to its jurisdiction over the case.¹ This may be done by filing the petition and allowance (if there be such petition and allowance), or by filing the appeal bond duly approved or by procuring the signing of the citation.² Since a formal order of allowance is unnecessary,³ it is a sufficient compliance with this section, if the party procures the allowance of an appeal bond and files the same within the statutory period; or procures the signing of a citation.⁴ If, however, there is a petition and allowance, it is not necessary that the bond be filed within the two years,⁵ or that the citation be signed within the statutory time,⁶ though in such a case it is necessary that the petition and allowance be filed in season.⁷ It will be noted that what is here under discussion is simply the question when an appeal is taken so as to satisfy the limitation as to time. Compliance with the requirements of this section is not necessarily sufficient to give an appellant standing in the higher court. Thus, he may fail for neglecting to comply with rule 35,⁸ requiring filing of an assignment of errors; or with rule 8 requiring the return of the record within a specified time.⁹ Failure to comply with those requirements may necessitate beginning all over again with the procedure for appeal if, meanwhile, the statutory period has not elapsed.

[d] Within two years after entry of judgment.

The writ of error must be brought or the appeal must be taken within two years from the date of the final decree or judgment.¹² Hence failure to take an appeal or sue out writ of error within that time is ground for dismissal.¹³ The statute begins to run from the time judgment is filed

¹*Credit Co. v. Arkansas, etc. Ry.* 128 U. S. 261, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; see *In re McKenzie*, 180 U. S. 547, 45 L. ed. 661, 21 Sup. Ct. Rep. 472.

²*Credit Co. v. Arkansas, etc. Ry.* 128 U. S. 261, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Harkrader v. Wadley*, 172 U. S. 163, 43 L. ed. 404, 19 Sup. Ct. Rep. 125. And see *Fowler v. Hamill*, 139 U. S. 550, 35 L. ed. 266, 11 Sup. Ct. Rep. 664.

³*Chamberlain, etc. Co. v. Coal Co.* 126 Fed. 165; and cases cited.

⁴*Brandus v. Cochrane*, 105 U. S. 262, 26 L. ed. 989; *Brown v. McConnell*, 124 U. S. 490, 31 L. ed. 496, 8 Sup. Ct. Rep. 560; *Harkrader v. Wadley*, 172 U. S. 163, 43 L. ed. 403, 19 Sup. Ct. Rep. 125; *Louisville Trust Co. v. Stockton*, 72 Fed. 2, 18 C. C. A. 408; *Farmers, etc. Co. v. Chicago, etc. Ry.* 73 Fed. 316, 19 C. C. A. 477;

In re Woerishoffer, 74 Fed. 916, 21 C. C. A. 175.

⁵*Evans v. State Bank*, 134 U. S. 331, 33 L. ed. 918, 10 Sup. Ct. Rep. 493.

⁶See *Berliner, etc. Co. v. Seaman*, 108 Fed. 715, 47 C. C. A. 630.

⁷*Norcross v. Nave, etc. Co.* 101 Fed. 797, 42 C. C. A. 29; see *Fowler v. Hamill*, 139 U. S. 549, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

⁸Post, § 1930.

⁹Post, § 1950.

¹²*Farrar v. Churchill*, 135 U. S. 613, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

¹³*Whitsitt v. Union Depot Co.* 122 U. S. 363, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1248; *Fowler v. Hamill*, 139 U. S. 550, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; *Condon v. Central, etc. Co.*

and entered.¹⁴ But in computing the time, the day of entry of such judgment is excluded.¹⁵ Since the statute runs from the date of final judgment, a petition for rehearing presented in season and entertained by the court, delays the running of the statute until it is disposed of.¹⁶ But a motion filed to set aside a decree, by persons not parties to the suit, does not suspend the decree so as to extend the time in which the appeal will be allowed.¹⁷ The statute having run an appeal cannot be taken on a *nunc pro tunc* order.¹⁸

[e] When disability will postpone limitation.

No disability will postpone the operation of the statute unless it exists when the cause of action accrues.¹ Hence the fact that a person against whom a decree was rendered was imprisoned ten months after such decree will not prevent the running of the time for the taking of appeal.²

§ 1903. Prize cases to be appealed within thirty days.

Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case: Provided, That the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein.

R. S. § 1009, U. S. Comp. Stat. 1901, p. 715.

Prize cases are still appealable direct to the supreme court.⁷ The allowance of appeals and of amendments of appeals in prize cases is authorized

73 Fed. 907, 20 C. C. A. 110; *White v. Iowa*, etc. Bank, 71 Fed. 97, 17 C. C. A. 621; *Union Pac. etc. Co. v. Colorado*, etc. R. Co. 54 Fed. 22, 4 C. C. A. 161; *Hamilton v. Brown*, 53 Fed. 753, 3 C. C. A. 639.

¹⁴*Radford v. Folsom*, 131 U. S. 394, 33 L. ed. 203, 9 Sup. Ct. Rep. 792; *Polleys v. Black River Imp. Co.* 113 U. S. 84, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Credit Co. v. Arkansas*, etc. Ry. 128 U. S. 260, 32 L. ed. 449, 9 Sup. Ct. Rep. 108; *Connecticut*, etc. Ins. Co. v. *Oldendorff*, 73 Fed. 90, 19 C. C. A. 379; and see *Mussina v. Cavazos*, 6 Wall. 355, 18 L. ed. 810; *Brooks v. Norris*, 11 How. 204, 13 L. ed. 666.

¹⁵*Smith v. Gale*, 137 U. S. 578, 34 L. ed. 792, 11 Sup. Ct. Rep. 185.

¹⁶*Texas*, etc. Ry. v. *Murphy*, 111 U. S. 489, 28 L. ed. 492, 4 Sup. Ct. Rep. 497; *Kingman v. Western*, etc. Co. 170 U. S. 678, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; *Aspen Min. etc. Co. v. Billings*, 150 U. S. 36, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; *Northern Pac. R. R. v. Holmes*, 155 U. S. 138, 39 L. ed. 99, 15 Sup. Ct. Rep. 28; see also *Brockett v. Brockett*, 2 How. 241, 11 L. ed. 251.

¹⁷*Sage v. Central R. R.* 93 U. S. 419, 23 L. ed. 933.

¹⁸*Credit Co. v. Arkansas*, etc. Ry. 128 U. S. 261, 32 L. ed. 448, 9 Sup. Ct. Rep. 107.

¹*McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142.

²*Idem*.

⁷*Ante*, § 42.

by Revised Statutes, § 4636.⁸ Under the above provision, whenever it appears that notice of appeal or of intention to appeal has been filed with the clerk of the district court within thirty days from final decree an appeal will be allowed to the supreme court whenever justice seems to require it.⁹

§ 1904. Time for appeal from circuit court of appeals to Supreme Court.

No such appeal shall be taken or writ of error sued out [i. e., no appeal from the circuit court of appeals to the Supreme Court] unless within one year after the entry of the order, judgment or decree sought to be reviewed. ♦

Part of § 6, act March 3, 1891, c. 517, 26 Stat. 826, U. S. Comp. Stat. 1901, p. 550.

The above provision relates exclusively to writs of error or appeals taken to the supreme court from the circuit court of appeals, and hence does not repeal the statutory provision as to the taking of appeals to the supreme court from circuit or district courts.¹¹

§ 1905. Time within which appeals to circuit court of appeals to be taken.

No appeal,^[a] or writ of error^[b] by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed. Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit court of appeals.^[c] . . .

Part of § 11, ac Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

[a] Taking of appeal to circuit court of appeals.

The omitted portion of the section provides for method of review, appeal bond, etc., under the act, and is given elsewhere.¹⁵ The general question as to when an appeal is "taken" and a writ of error "sued out" on appeal to the supreme court, has been discussed in a previous section.¹⁶ The

⁸See ante, § 1333, and see also post, Rep. 518; *Holt v. Indiana Mfg. Co.* 176 U. S. 70, 44 L. ed. 376, 20 Sup. Ct. Rep. 272.

⁹The *Nuestra de Regla*, 17 Wall. 29, 21 L. ed. 596.

¹¹*Allen v. Southern Pac. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. 1509

¹⁵Ante, § 1890; post, § 2015.

¹⁶See ante, § 1902, and notes.

same principles apply to cases of appeal to the circuit court of appeals.¹⁷ It is not necessary that the security be given within the statutory six months,¹⁸ if in some other way the matter has been brought to the notice of the trial court. An assignment of errors must be filed with the trial court before a writ of error or an appeal will be allowed.¹⁹

[b] Writ of error when brought.

A writ of error is not properly brought until filed in the court below.³ Mere failure of the clerk to perform the ministerial act of endorsing the writ as filed will not prevent the writ being considered as brought if actually delivered to the clerk.⁴ The issue and filing of the writ are the essentials, and the fact that the petition, assignment of errors, and order allowing the writ were filed, is insufficient.⁵

[c] Appeal to be taken or writ of error to be brought within six months.

The circuit court of appeals has no jurisdiction in a case where more than six months intervene between the day of the judgment and the taking of appeal⁹ or suing out of the writ of error.¹⁰ The rule is strictly adhered to and the fact that a writ of error was allowed within that time, but not issued, does not give the court jurisdiction.¹¹ The time cannot be enlarged by stipulation of the parties nor by the order of the court.¹² Nor can the parties confer jurisdiction on the court to review a judgment six months after its entry by the voluntary appearance of the necessary parties to the appeal.¹³ The fact that an appeal was erroneously taken instead of a writ of error does not give the right to bring the writ, the time having expired.¹⁴ When the last day of the six months falls on Sunday, the appeal cannot be taken or the writ of error sued out on any subsequent day.¹⁵ The time does not commence to run until entry of final judgment.¹⁶

¹⁷See *Cotter v. Railroad*, 61 Fed. 747, 10 C. C. A. 35. Compare *Green v. Lynn*, 87 Fed. 839, 31 C. C. A. 248; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

¹⁸*Wickelman v. A. B. Dick Co.* 85 Fed. 851, 29 C. C. A. 436.

¹⁹See C. C. A. Rule 11, post, § 1931.

³*United States v. Baxter*, 51 Fed. 624, 2 C. C. A. 410; *Threadgill v. Platt*, 71 Fed. 3; *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379; *Mut. Life Ins. Co. v. Phinney*, 76 Fed. 617, 22 C. C. A. 425.

⁴*Mutual Life Ins. Co. v. Phinney*, 178 U. S. 336, 44 L. ed. 1093, 20 Sup. Ct. Rep. 906. And see *United States, etc. Bank v. First Nat. Bank*, 79 Fed. 296, 24 C. C. A. 597.

⁵*Waxahachie v. Coler*, 92 Fed. 285, 34 C. C. A. 349.

⁹*Connecticut, etc. Ins. Co. v. Oldendorf*, 73 Fed. 88, 19 C. C. A. 379;

White v. Iowa, etc. Bank, 71 Fed. 97, 17 C. C. A. 621; *Threadgill v. Platt*, 71 Fed. 1; *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379; *Union Pac. R. Co. v. Colorado, etc. R. Co.* 54 Fed. 22, 4 C. C. A. 161; *Coulliette v. Thomason*, 50 Fed. 787, 1 C. C. A. 675.

¹⁰*Condon v. Central, etc. Co.* 73 Fed. 907, 20 C. C. A. 110; *Desvergers v. Parsons*, 60 Fed. 143, 8 C. C. A. 526.

¹¹*Rutan v. Johnson*, 130 Fed. 109, 64 C. C. A. 443.

¹²*Stevens v. Clark*, 62 Fed. 324, 10 C. C. A. 379.

¹³*Dodson v. Fletcher*, 79 Fed. 129, 24 C. C. A. 466.

¹⁴*Carter Co. v. Schmalsteg*, 127 Fed. 127, 62 C. C. A. 78.

¹⁵*Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399.

¹⁶*Marks v. Northern Pac. R. Co.*

Hence a motion or petition for rehearing, presented in season,¹⁷ or a motion for a new trial filed in due time¹⁸ must be first heard, the judgment not taking final effect for the purposes of the writ of error or appeal, until such matters are disposed of. A decree for specific performance terminating the litigation between the parties, but reserving the cause for any further direction that might become necessary, by failure of either party to comply with the requirements of the decree, is a final decree.¹⁹

§ 1906. — from interlocutory injunction or receivership order.

The appeal [to the circuit court of appeals from an interlocutory order or decree granting or continuing an injunction or appointing a receiver³] must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court.

Part of § 7, act Mar. 3, 1891, c. 517, 26 Stat. 828, as amended April 14, 1906, c. 1627, 34 Stat. 116.

Where the appeal from the order or decree is not taken in open court a citation is necessary, but it need not be issued within the statutory thirty days. If petition for appeal and allowance, and filing of bond occur within that time.⁴

§ 1907. Time and manner of appeal from Court of Claims.

All appeals from the court of claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

R. S. § 708, U. S. Comp. Stat. 1901, p. 575.

Under an act of 1887,⁷ providing for the bringing of suits against the United States, the period of ninety days above mentioned is enlarged in such cases to six months.⁸ The limitation ceases to run from the time of application for an appeal and subsequent delays will not prejudice the party.⁹

§ 1908. — when limitation of time ceases to run.

The limitation of time for granting such appeal [i. e., from the

76 Fed. 941, 22 C. C. A. 630; Duncan Trust Co. v. Stockton, 72 Fed. 1, 18 v. Railroad, 88 Fed. 840. C. C. A. 408.

¹⁷Kingman v. Western Mfg. Co. 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; Northern Pac. R. Co. v. Holmes, 155 U. S. 137, 39 L. ed. 99, 15 Sup. Ct. Rep. 28; Voorhees v. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101, 14 Sup. Ct. Rep. 295.

¹⁸Alexander v. United States, 57 Fed. 828, 6 C. C. A. 602; Louisville Trust Co. v. Stockton, 72 Fed. 1, 18 C. C. A. 408.

¹⁹Long v. Maxwell, 59 Fed. 948, 8 C. C. A. 410.

³See ante, § 78.

⁴Berliner, etc. Co. v. Seaman, 108 Fed. 715, 47 C. C. A. 630.

⁷See post, § 1899.

⁸United States v. Davis, 131 U. S. 37, 33 L. ed. 93, 9 Sup. Ct. Rep. 657.

⁹United States v. Adams, 6 Wall. 101, 18 L. ed. 792; post, § 1898.

Court of Claims to the Supreme Court] shall cease to run from the time an application is made for the allowance of appeal.

Part of rule 3 in reference to appeals from the Court of Claims as promulgated by the Supreme Court, Dec. term, 1865.¹²

This rule is given in full elsewhere.¹³

§ 1909. — time for appeal under act of 1887.

No appeal or writ of error shall be allowed after six months from the judgment or decree in such suit [i. e., suit in Court of Claims.]

Part of § 10 of act Mar. 3, 1887, c. 359, 24 Stat. 507, U. S. Comp. Stat. 1901, p. 756.

This provision supersedes R. S. § 708¹⁶ as to all cases covered by the act of 1887.¹⁷

§ 1910. Anti-trust cases must be appealed within sixty days.

An appeal from the final decree of the circuit court [in a suit in equity by the United States to enforce anti-trust laws] will lie only to the Supreme Court and must be taken within sixty days from the entry thereof.

No appeal or writ of error by which any final order or judgment

Part of § 2, act Feb. 11, 1903, c. 544, 32 Stat. 823.

§ 1911. Time for appeal from Alaska District Court.

may be reviewed under the provisions of this act [governing appeals and writs of error from the Alaska district court] shall be taken or sued out except within one year after the entry of the order or judgment sought to be reviewed.

§ 506, Alaska code, act June 6, 1900, c. 786, 31 Stat. 415.

§ 1912. Time for direct appeals to Supreme Court from Indian Territory.

Appeals allowed from the United States courts in the Indian Territory district to the Supreme Court, must be perfected within sixty days from final judgment.

Author's section.

It is so provided in an act of July 1, 1898.¹

¹²³ Wall. VIII.

¹³ Post, § 1927.

¹⁶ U. S. Comp. Stat. 1901, p. 575.

¹⁷ United States v. Davis, 131 U. S.

39, 33 L. ed. 93, 9 Sup. Ct. Rep. 657.

¹ C. 545, 30 Stat. 591; see ante,

§ 1913. Time for appeals in revenue cases from board of appraisers.

An appeal [from the circuit court's decision, reviewing the decision of the board of general appraiser in revenue cases] shall be allowed on the part of the United States whenever the Attorney General shall apply for it within thirty days after the rendition of such decision.

Part of § 15, c. 407, act June 10, 1890, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

The jurisdiction of the circuit court to review the appraisers decision is defined by other portions of this section.³

§ 1914. Time for writ of error in capital cases.

No such writ of error [i. e., to the Supreme Court on conviction of capital crime in any court of United States] shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term and within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.

Part of § 6, act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 569, 570.

Other portions of § 6 are given elsewhere.⁶

§ 1915. — for appeal on injunction in Commerce Commission cases.

Appeal from an interlocutory order or decree granting or continuing an injunction in any suit to annul, enjoin or suspend an order of the commerce commission, must be within thirty days from entry of the order or decree.⁹ Suits in the name of the United States under the anti-trust and commerce laws must be taken within sixty days.¹⁰

Author's section.

§ 1916. Parties on appeal where judgment or decree is joint.

Where a joint judgment or decree is rendered against several

³Ante, § 140.

⁶See post, §§ 1926, 2122.

⁹See ante, § 1372.

¹⁰Ante, § 62.

parties all must join in the writ of error or appeal or it will be dismissed except a sufficient cause for non-joinder is shown.

Author's section.

The above rule has been repeatedly affirmed.¹⁴ Two reasons for it have been assigned, first that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reversed, and second that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.¹⁵ Formerly, where one of the parties refused to join in the writ of error, the remedy was by summons and severance of such party which barred him from subsequently suing out the writ.¹⁶ Under the present practice it is sufficient if it appears that the party was notified in writing and failed to appear, or appeared and refused to join. On such failure or refusal the writ or appeal may be prosecuted.¹⁷ The rule however, has been held not to apply where though there are several parties the judgment against the appellant was separate,¹⁸ or where one of two parties had no real interest.¹⁹

¹⁴Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953; Faulkner v. Hutchins, 126 Fed. 362; Hardee v. Wilson, 146 U. S. 181, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Davis v. Trust Co. 152 U. S. 590, 38 L. ed. 563, 14 Sup. Ct. Rep. 693.

¹⁵Masterson v. Herndon, 10 Wall. 446, 19 L. ed. 953.

¹⁶Todd v. McDaniel, 16 Pet. 521, 10 L. ed. 1054; see also Williams v. Bank, 11 Wheat. 414, 6 L. ed. 508;

Masterson v. Herndon, 10 Wall. 416, 19 L. ed. 953.

¹⁷Hardee v. Wilson, 146 U. S. 182, 36 L. ed. 934, 13 Sup. Ct. Rep. 39; Feibelman v. Pac. Road, 108 U. S. 14, 27 L. ed. 138; O'Dowd v. Russell, 14 Wall. 404, 20 L. ed. 858.

¹⁸Germain v. Mason, 12 Wall, 261, 20 L. ed. 392.

¹⁹Mercantile, etc. Co. v. Kanawha, 58 Fed. 6, 7 C. C. A. 3.

CHAPTER 58.

MODE OF TAKING APPEAL, ASSIGNMENTS AND EXCEPTIONS.

- § 1922. Procedure on application for certiorari to circuit court of appeals.
- § 1923. Mode of procuring review in circuit court of appeals.
- § 1924. Allowance of appeals direct from circuit and district courts to Supreme Court, citation, bond and supersedeas.
- § 1925. Writ of error may be issued by lower court—form.
- § 1926. Form of citation on writ of error from circuit to district courts.
- § 1927. —on writ of error from supreme court.
- § 1928. Amendment of writ of error.
- § 1929. Appeals subject to same rules as writs of error.
- § 1930. Assignment of errors on appeal direct to supreme court.
- § 1931. —on appeal to circuit court of appeals.
- § 1932. Bill of exceptions and authentication.
- § 1933. —general exceptions to courts instructions not allowed.
- § 1934. Taking of appeal in admiralty.
- § 1935. Amendments in prize appeals.
- § 1936. Writ of error in capital cases as of right without security.
- § 1937. Order allowing appeal from court of claims.
- § 1938. Findings to be filed by court of claims.
- § 1939. —parties to request findings.
- § 1940. Statement or findings by Territorial courts.

§ 1922. Procedure on application for certiorari to circuit court of appeals.

In applying for a writ of certiorari under the act of March 3, 1891, the practice requires the petition for the writ to be docketed, and, in order to do so, the petitioner must furnish an original petition, a certified copy of the transcript of record, including therein all the proceedings in the circuit court of appeals. \$25 as deposit on account of costs, and an order for appearance for the petitioning party, signed by a member of the bar of the Supreme Court. Petitions are docketed in the Supreme Court under the title of ————, Petitioner, vs. ————, Respondent.

Some Monday should be fixed upon for the submission of the petition, that being motion day, and sufficient notice given counsel for respondents of the date selected, to enable them to file briefs

in opposition, if they desire to do so, and proof of service of such notice filed in the Supreme Court.

Petitions must be called up and submitted (oral argument is not permitted) in open court by counsel, and before the submission, 25 printed copies of the petition and of such briefs as are filed in support of same, must be furnished. In addition to the certified copy of the transcript of the record, required by Rule 37,²⁰ a sufficient number of printed copies thereof (not less than ten) must be furnished to supply the Supreme Court. Should it be necessary to reprint the record for use on the hearing of the petition, 50 copies should be printed, under the supervision of the Supreme Court clerk, in order that there may a sufficient number for use on the final hearing, should the petition be granted.

(Instructions issued by James Hall McKenney, clerk of the Supreme Court.)

§ 1923. Mode of procuring review in circuit court of appeals.

Under section eleven of the act establishing the circuit court of appeals the existing method and system of review are adopted for appeals to that court.¹ The practitioner must therefore apply the statutory provisions found in this and other chapters and originally framed for appeals to the circuit and Supreme Courts.^{[a]-[b]}

Author's section.

[a] Instructions and directions.

The practitioner will find very helpful a set of instructions prepared by the clerk of the circuit court of appeals for the fourth circuit and approved by the court.⁴ They are in part as follows:

All appeals, whether by writ of error or appeal, should be taken in the following manner: (1) Petition in writing for the appeal, or writ of error addressed to the court below, or the judge thereof in vacation. (2) The petition must be accompanied with an assignment of errors and a prayer for reversal. (3) Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ. (4) Order of the judge in writing allowing the writ of error or appeal. (5) Issuing the writ of error by the clerk of the circuit court or of this court. (6) In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding thirty days⁶ from the day of signing the

²⁰See post, § 1962.

¹Ante, § 1880.

⁴Issued July 1, 1896, by Henry T. Maloney, clerk. See 90 Fed. LXXXV.

⁶⁰days on appeal to the Supreme Court from the far western States and Territories. See post, § 1951.

citation should bear the same return day. But in cases of appeal (in ad-term time; and the record must be filed in the clerk's office of this court before the return day, unless the time be enlarged as provided in section 1 of rule 16.⁷ In that case the order of enlargement must be filed with the clerk of this court. Rule 11, entitled 'assignments of errors' requires the plaintiff in error, or appellant, to file with the court below with his petition for the writ of error or appeal, an assignment of errors, etc.⁸ This practically abolishes the necessity of pursuing the old method of praying appeals in 'open court;' and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or supersedeas bond, and signs the citation. In cases brought up by a writ of error, from either the circuit or district courts, the clerk of the circuit court or the clerk of this court issues the writ of error, which writ fixes the return day of the writ to this court, and the citation should bear the same return day. But in cases of appeal (in admiralty or equity) the citation alone fixes the return day. Petition and order allowing the writ, under the seal of the court, with a fee of \$5 for issuing it, must be transmitted to the clerk of this court, whereupon the writ will be issued and forwarded to the clerk of the court below. All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places.

Other portions of these very excellent instructions are given elsewhere.¹⁰

[b] Special rules in second, fifth, and eighth circuits.

In the second circuit the following rule has been adopted as to the taking of an appeal or writ of error:

"An appeal or writ of error from a circuit court or a district court to this court in the cases provided for in sections 6 and 7 of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes,' approved March 3, 1891, and acts to amend said act approved February 18, 1895 and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal."¹¹

In the fifth and eighth circuits there is a similar rule applicable however only to writ of error in criminal cases.¹²

⁷See post, § 1952.

⁸Post, §§ 1930, 1931.

¹⁰Post, § 1972.

¹¹See Rule 36, cl. 1, 2d circuit in appendix.

¹²See appendix I. E.

§ 1924. Allowance of appeals direct from circuit and district courts to Supreme Court,—citation, bond and supersedeas.

An appeal^[a] or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1901,¹⁵ may be allowed, in term-time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district,^{[b]-[c]} and the proper security be taken and the citations signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

36th Supreme Court rule, promulgated May 11, 1891.¹⁶

[a] Allowance of appeal—cross appeals.

A rule similar to the above has been adopted by the circuit court of appeals for the second, fifth and eighth circuits.¹⁷

The appeal may be allowed in open court before the end of the term in which the decree is rendered, or it may be prayed after the court has risen.¹⁸ In the latter case the appellant must proceed in the same manner as is directed in the suing out of a writ of error; that is, an allowance may be made by the judge and a citation issued returnable with the record.¹⁹ When allowed in open court it is presumed to be allowed by duly authorized judge, and the record cannot be changed to show otherwise by affidavit in the appellate court.²⁰ Some action amounting in law to an allowance is necessary, as without it neither the supreme court,⁴ nor the circuit court of appeals,⁵ can acquire jurisdiction, although it is not necessary that there be a formal order of allowance.⁶ The power to allow an appeal is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held.⁷ Whoever can sign a citation may allow an appeal,⁸ and this may be done by a judge of the circuit court or a justice of the supreme court.⁹ If prayed for, the appeal must be allowed

¹⁵See ante, § 42.

¹⁶139 U. S. 706.

¹⁷See ante, § 1923. [b]

¹⁸Yeaton v. Lenox, 7 Pet. 220, 8 L. ed. 664.

¹⁹Yeaton v. Lenox, 7 Pet. 220, 8 L. ed. 664; Villabolas v. United States, 6 How. 90, 12 L. ed. 356.

²⁰Columbus, etc. Co. v. Standard, etc. Co. 145 Fed. 186, (C. C. A.).

⁴Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786; Barrel v. Western Trans-

portation Co. 3 Wall. 424, 18 L. ed. 168.

⁵Green v. Lynn, 87 Fed. 840, 31 C. C. A. 248.

⁶Brandies v. Cochrane, 105 U. S. 262, 26 L. ed. 989.

⁷Sage v. Railroad Co. 96 U. S. 715, 24 L. ed. 644.

⁸Sage v. Railroad Co. 96 U. S. 715, 24 L. ed. 644.

⁹Post, § 1927.

being a matter of right,¹⁰ and mandamus will be granted to compel a judge to allow an appeal in a proper case.¹¹ When the trial court makes an order allowing an appeal, through a mistake, such order may and should be vacated.¹²

Cross appeals are taken and prosecuted in the same manner as original appeals.¹⁶ Hence a cross appeal is not "taken" until brought to the attention of the court whose decree it questions.¹⁷ It may be allowed by the lower court, and the citation signed and the bond approved if done within the statutory two years, although the record may have been removed to the appellate court.¹⁸

[b] Writ of error—form and contents.

A writ of error issues in the name of the President of the United States and is tested of the date of its issue,¹ in the name of the chief justice of the United States or when that office is vacant in the name of the associate justice next in precedence.² It must be under the seal of the court which issues it and bear the signature of the clerk.³ It was early decided that a writ of error to remove a cause to the supreme court could issue only from the office of the clerk of that court.⁴ Under a provision of the Revised Statutes,⁵ however, the issuance of the writ by clerks of the circuit court is authorized,⁶ whether returnable to the supreme court or the circuit court of appeals.⁷ The writ should set out the names of all the parties,⁸ and hence it is insufficient to describe the plaintiffs in error, as heirs of a certain person,⁹ or to describe them as a certain firm when the appeal is taken in the name of the individual members.¹⁰ Likewise it is insufficient to name one of the plaintiffs or defendants describing the rest on the same side as "the others."¹¹ Such defects may however be amended.¹²

¹⁰The Douro, 3 Wall. 564, 18 L. ed. 168.

¹¹Ex parte South, etc. R. Co. 95 U. S. 221, 24 L. ed. 355; Ex parte Parker, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; see Lewis v. Baltimore, etc. R. Co. 62 Fed. 218; 10 C. C. A. 446.

¹²Farmers, etc. Co. v. McClure, 78 Fed. 211, 24 C. C. A. 66.

¹⁶Farrar v. Churchill, 135 U. S. 610, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; The Osborn, 105 U. S. 450, 26 L. ed. 1066; Hilton v. Dickinson, 108 U. S. 169, 27 L. ed. 689, 2 Sup. Ct. Rep. 424.

¹⁷Idem; see Credit Co. v. Arkansas, Ry. Co. 128 U. S. 261, 32 L. ed. 450, 9 Sup. Ct. Rep. 107.

¹⁸Farrar v. Churchill, 135 U. S. 610, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

¹Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265; see ante, § 836.

²Germain v. Mason, 154 U. S. 587, 20 L. ed. 689, 14 Sup. Ct. Rep. 1170; see ante, § 836, et seq.

³Miller v. Texas, 153 U. S. 535, 28 L. ed. 812, 14 Sup. Ct. Rep. 874.

⁴West v. Barnes, 2 Dall. 401, 1 L. ed. 433.

⁵See post, § 1925.

⁶Mussina v. Cavazos, 6 Wall. 357, 18 L. ed. 810.

⁷Northern Pac. R. Co. v. Amato, 49 Fed. 881, 1 C. C. A. 468.

⁸Smyth v. Strader, 12 How. 327, 13 L. ed. 1008; Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879.

⁹Wilson v. Life, etc. Ins. Co. 12 Pet. 140, 9 L. ed. 1032.

¹⁰Moore v. Simonds, 100 U. S. 145, 25 L. ed. 590.

¹¹Deneale v. Archer, 8 Pet. 526, 8 L. ed. 1033; Miller v. McKenzie, 10 Wall. 582, 19 L. ed. 1043.

¹²See post, § 1928.

[c]—petition, allowance and issuance.

It is the practice on appeal to the Supreme Court or to the circuit court of appeals to file a petition for the writ and to have it allowed by the judge of the trial court or of the court of review.¹⁵ No set form for the petition is prescribed.¹⁶ It is the better practice for the judge to indorse his allowance both on the petition and on the writ itself, but an indorsement on either is sufficient.¹⁷ The writ issues from the Supreme Court to the circuit and district courts as a matter of right,¹⁸ hence the formal allowance is not necessary,¹⁹ it being sufficient if an assignment of errors is filed, the bond approved, and the citation issued.²⁰ Procedure on error to a State court is governed by the same rules as to inferior Federal courts.¹

§ 1925. Writ of error may be issued by lower court—form.

Writs of error returnable to the Supreme Court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the Supreme Court.^[a] When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the Supreme Court, in pursuance of section nine of the act of May 8, 1792, chapter thirty-six.^[b]

R. S. § 1004, U. S. Comp. Stat. 1901, p. 713.

[a] Issuance in general.

The above section was originally enacted in 1792.⁴ Prior to its adoption, a writ of error returnable to the Supreme Court could issue only from the office of the clerk of the Supreme Court.⁵ Now, however, the clerks of the circuit court may also issue such writs, and, since the act establishing the circuit court of appeals adopts "all provisions of law now in force regulating the methods and system of review," clerks of the circuit court of appeals also have power to issue writs of error returnable to that court.⁶ Under the act of 1838, authorizing writs of error from judgments of a territorial supreme court in the same manner as from the Federal circuit

¹⁵*Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21. See *Tefft v. Stein*, 74 Fed. 755, 21 C. C. A. 73.

¹⁶See *Tefft v. Stein*, 74 Fed. 755, 21 C. C. A. 74.

¹⁷*Warner v. Texas, etc. R. Co.* 54 Fed. 920, 4 C. C. A. 670.

¹⁸*In re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; *Hudson v. Parker*, 156 U. S. 277, 39 L. ed. 424, 15 Sup. Ct. Rep. 450; *Ex parte Virginia*, 112 U. S. 178, 28 L. ed. 691, 5 Sup. Ct. Rep. 421.

¹⁹*Ex parte Virginia*, 112 U. S. 177,

28 L. ed. 691, 5 Sup. Ct. Rep. 421; *Louisville Trust Co. v. Stockton*, 72 Fed. 2, 18 C. C. A. 408; *Fitzpatrick v. Graham*, 119 Fed. 354, 56 C. C. A. 95; *Davidson v. Lanier*, 4 Wall. 447, 18 L. ed. 377.

²⁰*Alaska Mining Co. v. Keating*, 116 Fed. 565, 53 C. C. A. 655.

¹See post, § 1889.

⁴Act May 8, 1792, c. 36, § 9, 1 Stat. 278.

⁵*West v. Barnes*, 2 Dall. 401, 1 L. ed. 433.

⁶*Northern Pac. R. Co. v. Amato*, 49 Fed. 882, 1 C. C. A. 468.

court, a writ was held to have been properly issued by a clerk of the territorial court,⁷ and it is still the practice under later acts to have the writ issued by the clerk of the Territorial court.

[c] Writs to be agreeable to certain form.

The ninth section of the act referred to in the above section¹⁰ provided that a form of a writ of error approved by any two judges should be transmitted to the clerks of the circuit court who should issue writs to conform therewith as nearly as possible.¹¹ All forms that have been furnished to the clerks of the circuit court provide that the writ should be addressed to final judgment only, and hence a writ addressed to an order of the court which is not final, will be dismissed.¹² The form thus established provided also that the writ should be returnable on the first day of the term next ensuing the issuing of the writ.¹³ The time of return is now however regulated by rules adopted by the Supreme Court.¹⁴ The general requirements as to form of Federal writs and process are considered in another chapter of this code.¹⁵

§ 1926. Form of citation on writ of error from circuit to district courts.

When the writ [i. e., writ of error] is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the circuit judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least twenty days' notice.

R. S. § 998, U. S. Comp. Stat. 1901, p. 712.

This section is abrogated by the circuit court of appeals act abolishing the appellate jurisdiction of circuits courts. By the eleventh section of that act¹⁶ any judge of the circuit court of appeals has the same powers and duties as to the allowance of writs of error as the other Federal justices or judges. The citation is considered generally in the following Code section.¹⁷

§ 1927. — on writ of error from Supreme Court.

When the writ is issued by the Supreme Court to a circuit court, the citation^{[a]-[e]} shall be signed by a judge of such circuit court, or by a justice of the Supreme Court,^[f] and the adverse party shall have at least thirty days' notice;^[g] and when it is issued by the

⁷Sheppard v. Wilson, 5 How. 211, 12 L. ed. 120.

¹⁰Act May 8, 1792, c. 36, § 9, 1 Stat. 278.

¹¹Barton v. Forsyth, 5 Wall. 193, 18 L. ed. 545; Insurance Co. v. Mordecai, 21 How. 200, 16 L. ed. 95.

¹²Barton v. Forsyth, 5 Wall. 193, 18 L. ed. 545.

¹³Insurance Co. v. Mordecai, 21 How. 200, 16 L. ed. 95.

¹⁴See post, § 1950, et seq.

¹⁵Ante, § 835 et seq.

¹⁶See ante, § 1890.

¹⁷Post, § 1927.

Supreme Court to a State court, the citation shall be signed by the Chief Justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States,^[1] and the adverse party shall have at least thirty days' notice.

R. S. § 999, U. S. Comp. Stat. 1901, p. 712.

[a] Necessity for citation—on appeal.

A citation is a summons to the opposite party to appear.¹ In cases of appeal, it is intended as notice to the appellee, that an appeal has been taken and will be duly prosecuted.² No special form is required and it is frequently said to be not jurisdictional.³ When appeal is allowed in open court and perfected during the term citation is unnecessary since the appellee is considered to have sufficient notice in such case.⁴ But if the appeal is not taken in open court or the security is not given until an ensuing term a citation should issue.⁵ In the latter case it is necessary to show that the appeal which was allowed in term, has not been abandoned,⁶ if the appellant fail to issue and serve the citation a motion to dismiss will not lie until an opportunity to do so has been granted.⁷

In case of appeal after the term when the decree was rendered a citation is necessary and must be issued and made returnable with the writ of error or appeal, unless waived.⁸ The necessity for such citation is not

¹Villabolas v. United States, 6 R. Co. v. Blair, 100 U. S. 661, 25 How. 90, 12 L. ed. 356.

²Dodge v. Knowles, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197.

³Dodge v. Knowles, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197; Farmers, etc. Trust Co. v. Chicago, etc. R. Co. 73 Fed. 316, 19 C. C. A. 477. See Dayton v. Lash, 94 U. S. 112, 24 L. ed. 34; Railroad Co. v. Blair, 100 U. S. 661, 25 L. ed. 587; Lockman v. Lang, 132 Fed. 4, 65 C. C. A. 621.

⁴Milner v. Meek, 95 U. S. 258, 24 L. ed. 447; Brockett v. Brockett, 2 How. 241, 11 L. ed. 251; Dodge v. Knowles, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197; Hewitt v. Filbert, 116 U. S. 142, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; Brown v. McConnell, 124 U. S. 491, 31 L. ed. 497, 8 Sup. Ct. Rep. 559; Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Central Trust Co. v. Continental Trust Co. 86 Fed. 517, 30 C. C. A. 235; Haskens v. St. Louis, etc. R. Co. 109 U. S. 106, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; Chicago, etc.

R. Co. v. Blair, 100 U. S. 661, 25 L. ed. 587. See also, Columbus, etc. Co. v. Standard, etc. 145 Fed. 186, (C. C. A.).

⁵Sage v. Railroad Co. 96 U. S. 715, 24 L. ed. 644; Haskins v. St. Louis, etc. Ry. 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; Brown v. McConnell, 124 U. S. 491, 31 L. ed. 497, 8 Sup. Ct. Rep. 559; National Bank v. Omaha, 96 U. S. 738, 24 L. ed. 881.

⁶Dodge v. Knowles, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197; Hewitt v. Filbert, 116 U. S. 144, 29 L. ed. 581, 6 Sup. Ct. Rep. 319; Richardson v. Green, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443.

⁷Dodge v. Knowles, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197; Lockman v. Lang, 132 Fed. 4, 65 C. C. A. 621 and cases cited.

⁸Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Hewitt v. Filbert, 116 U. S. 142, 29 L. ed. 581, 6 Sup. Ct. Rep. 319; Vansant v. Gas-Light Co. 99 U. S. 213, 25 L. ed. 265; Alviso v. United States, 5 Wall. 824, 18 L. ed. 492;

dispensed with by the presence of the appellee's counsel in court at the time of the allowance of such appeal.⁹

[b] — on writ of error.

Citation is essential to the validity of a writ of error,¹² hence when no citation has been issued and the defendant fails to appear the writ will be dismissed as notice in open court at the time when judgment was rendered is not equivalent to a citation. In this respect writs of error differ from appeals.¹³

[c] Designation of parties, issuance and service—alias citation.

The citation should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted,¹⁶ and should properly designate and describe such parties.¹⁷ Hence, where citation is issued to a person not a party to the judgment but merely a transferee thereof the writ of error will be dismissed on motion.¹⁸ So also where a party has died before the writ of error is issued, a writ and citation issued in the name of the deceased will be dismissed.¹⁹

[d] Service—alias citation.

Were the defendant in error has moved into another district, since the judgment, it seems that an order for service upon him by publication, or by the marshal of the district where he is found, may be granted.³ The citation should be served before the return day thereof.⁴ But failure to serve the citation within the time will not work a dismissal of the appeal, and the court may impose such terms upon the appellants as may be proper.⁵ A new or alias citation may be issued.⁶ But the court cannot issue cita-

Garrison v. Cass Co. 5 Wall. 823, 18 L. ed. 492; Castro v. United States, 3 Wall. 46, 18 L. ed. 163; United States v. Curry, 6 How. 111, 12 L. ed. 365; Villabolas v. United States, 6 How. 90, 12 L. ed. 356; Bacon v. Hart, 1 Black, 38, 17 L. ed. 52; Hogan v. Ross, 9 How. 602, 13 L. ed. 276; Brown v. Union Bank, 4 How. 465, 11 L. ed. 1058; Yeaton v. Lenox, 7 Pet. 220, 8 L. ed. 665; The San Pedro, 2 Wheat. 142, 4 L. ed. 205; Peace River, etc. Co. v. Edwards, 70 Fed. 728, 17 C. C. A. 358; West v. Irwin, 54 Fed. 419, 4 C. C. A. 401; Blomingsdale v. Watson, 128 Fed. 269, 62 C. C. A. 600.

S. 254, 30 L. ed. 914, 7 Sup. Ct. Rep. 874.

¹⁶Bigler v. Waller, 12 Wall. 147, 20 L. ed. 261; Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879.

¹⁷Kail v. Wetmore, 6 Wall. 451, 18 L. ed. 863; Peale v. Phipps, 8 How. 256, 12 L. ed. 1070.

¹⁸Davenport v. Fletcher, 16 How. 144, 14 L. ed. 879.

¹⁹McClane v. Boone, 6 Wall. 246, 18 L. ed. 836.

³Nations v. Johnson, 24 How. 195, 16 L. ed. 628; Renaud v. Abbott, 116 U. S. 590, 38 L. ed. 563, 14 Sup. Ct. Rep. 1194.

⁹Chicago, etc. R. Co. v. Blair, 100 U. S. 661, 25 L. ed. 587. See Richards v. Mackall, 113 U. S. 542, 28 L. ed. 1133, 5 Sup. Ct. Rep. 536.

¹²Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810.

¹³United States v. Phillips, 121 U. S. 1132, 5 Sup. Ct. Rep. 535.

⁴See post, § 1950.

⁵Dayton v. Lash, 94 U. S. 112, 24 L. ed. 33; Railroad Co. v. Blair, 100 U. S. 662, 25 L. ed. 587; Richards v. Mackall, 113 U. S. 542, 28 L. ed. 1132, 5 Sup. Ct. Rep. 535.

⁶Dayton v. Lash, 94 U. S. 112, 24 L. ed. 33.

tion after the term at which the appeal was docketed.⁷ Where the citation, on its face, runs to all parties, but is not served on some necessary to the appeal, who are not brought into court and do not appear, such failure is fatal to the appeal.⁸ Personal service of the citation is required either upon the party or his attorney, in the absence of equivalent notice or waiver.⁹ Service by mail is insufficient.¹⁰ Where, however, the attorney is dead, service cannot be had upon his personal representative, nor even on his partner, if not regularly appearing on the record as counsel.¹¹ Where the citation on a writ of error has not been served another one may be obtained.¹² So where a writ of error has been seasonably taken and returned to the circuit court of appeals, an alias citation may issue to bring in parties not served with the former citation, even though the time for taking the writ has then expired.¹³ A new citation also should issue to notify the defendant of a change in the return day of the writ.¹⁴

[e] Waiver of citation.

Since the citation is intended merely for notice it may be waived by the appellee or defendant in error. A general appearance in court constitutes such waiver.¹⁶ But a special appearance if promptly made, and limited to a motion to dismiss on the ground that no citation issued, does not constitute a waiver.¹⁷ And a general appearance made to dismiss a case, the appeal being inoperative because of failure to docket the transcript within the required time, does not operate as a waiver of the citation.¹⁸ A defective citation may also be cured by a general appearance¹⁹ and the same is true of a defect in the service of a citation.²⁰ Such irregularities to be available to the appellee or defendant in error must be taken advantage of promptly on a motion to dismiss and on an appearance limited to that spe-

⁷Hewitt v. Filbert, 116 U. S. 143, 29 L. ed. 581, 6 Sup. Ct. Rep. 319.

⁸Davis v. Mercantile Trust Co. 152 U. S. 590, 38 L. ed. 563, 14 Sup. Ct. Rep. 693.

⁹Tripp v. Santa Rosa St. R. Co. 144 U. S. 126, 36 L. ed. 372, 12 Sup. Ct. Rep. 655; Hewitt v. Filbert, 116 U. S. 142, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; Dayton v. Lash, 94 U. S. 112, 24 L. ed. 33; Bacon v. Hart, 1 Black, 38, 17 L. ed. 52.

¹⁰Tripp v. Santa Rosa St. R. Co. 144 U. S. 126, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

¹¹Bacon v. Hart, 1 Black, 38, 17 L. ed. 52.

¹²Bacon v. Hart, 1 Black, 38, 17 L. ed. 52.

¹³Altenberg v. Grant, 83 Fed. 980, 28 C. C. A. 244.

¹⁴National Bank v. Bank of Commerce, 99 U. S. 609, 25 L. ed. 362.

¹⁶Richardson v. Green, 130 U. S. 115, 32 L. ed. 876, 9 Sup. Ct. Rep. 443; Alviso v. United States, 5 Wall. 824, 18 L. ed. 492; Sage v. Railroad Co. 96 U. S. 715, 24 L. ed. 644; Villabolas v. United States, 6 How. 90, 12 L. ed. 856; Tripp v. Santa Rosa St. R. Co. 144 U. S. 129, 36 L. ed. 373, 12 Sup. Ct. Rep. 655; Buckingham v. McLean, 13 How. 150, 14 L. ed. 90.

¹⁷Buckingham v. McLean, 13 How. 151, 14 L. ed. 90. But see United States v. Yates, 6 How. 608, 12 L. ed. 577.

¹⁸Radford v. Folsom, 123 U. S. 727, 31 L. ed. 293, 8 Sup. Ct. Rep. 334.

¹⁹McDonough v. Millandon, 3 How. 707, 11 L. ed. 791; Buckingham v. McLean, 13 How. 151, 14 L. ed. 91.

²⁰Renaud v. Abbott, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194.

cial purpose.¹ Defects in the citation may be waived also by the counsel, by an acknowledgment of service.² An appellant cannot take advantage of his failure to have citation issued and he cannot have a case dismissed for want of citation when the other party is in court and makes no objection to the lack of one.³

[f] Citation on appeal from Federal court.

An early case held that the citation must be issued and signed by the court allowing the writ,⁶ but later cases indicate a more liberal construction of the statute.⁷ In the case of appeal, the appeal may be allowed and the appeal bond may be approved by one judge, and the citation issued by another.⁸ The citation must, however, be signed by a judge and when signed by the clerk it is insufficient.⁹ But it may be signed by a district judge sitting as judge of the circuit court, even though the circuit judge rendered the decree.¹⁰ Where the appeal is from the Supreme Court of the District of Columbia, to the United States Supreme Court it may be signed by a district judge.¹¹

[g] Notice.

It is held that the above provision as to the thirty days notice to the defendant in error, does not mean that the citation shall be served thirty days before the return day but simply that the defendant in error shall have thirty days' notice before being compelled to go to a hearing.¹³ In any event, the fact that the citation was served and made returnable less than thirty days after the writ was granted and citation issued, is no ground for dismissal.¹⁴

[h] Citation to State court by whom signed.

The allowance of the writ and the issuing of the citation must be either by a justice of the Supreme Court or by the chief justice of the State.¹⁶ Hence, when a writ of error is allowed by an associate State justice and the citation is signed by him the appellate court has no jurisdiction un-

¹Renaud v. Abbott, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194.

²Bigler v. Waller, 12 Wall. 148, 20 L. ed. 261. See Tripp v. Santa Rosa, etc. R. Co. 144 U. S. 129, 36 L. ed. 373, 12 Sup. Ct. Rep. 655.

³Pierce v. Cox, 9 Wall. 786, 19 L. ed. 786.

⁶Insurance Co. v. Mordecai, 21 How. 202, 16 L. ed. 96.

⁷Farmers, etc. Co. v. Chicago, etc. R. Co. 73 Fed. 316, 19 C. C. A. 477.

⁸Idem.

⁹Brown v. McConnell, 124 U. S. 489, 31 L. ed. 495, 8 Sup. Ct. Rep. 559; Freeman v. Clay, 48 Fed. 849, 1 C. C. A. 115; United States v. Hodge, 3 How. 534, 11 L. ed. 714.

¹⁰Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; Rodd v. Heartt, 17 Wall. 354, 21 L. ed. 627.

¹¹Richards v. Mackall, 113 U. S. 539, 28 L. ed. 1132, 5 Sup. Ct. Rep. 535.

¹³National Bank v. Bank of Commerce, 99 U. S. 609, 25 L. ed. 362.

¹⁴See Seagrist v. Crabtree, 127 U. S. 773, 32 L. ed. 323, 8 Sup. Ct. Rep. 1394; Andrews v. Thum, 64 Fed. 149, 12 C. C. A. 77.

¹⁶Bartemeyer v. Iowa, 14 Wall. 26, 20 L. ed. 792.

less it appears that such justice was acting as chief judge pro tem.¹⁷ The writ has been dismissed where the citation was signed by a district judge.¹⁸

§ 1928. Amendment of writ of error.

The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error,^[a] when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form:^[b] Provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error.^[c]

R. S. § 1005, U. S. Comp. Stat. 1901, p. 714.

[a] Amendment allowed at any time in court's discretion.

The above section was originally enacted in 1872.¹ Prior thereto, there was a general provision that no writ, judgment or other proceeding in a civil cause should be quashed or abated for defect of form.² Early Federal cases held that a writ of error might be amended as of course where the teste lacked a date³ or where there was no return day mentioned in the writ itself.⁴ A stricter rule was subsequently adopted, and amendments were refused where the return day was wrongly stated,⁵ or where the parties were incorrectly or indefinitely described.⁶ By the adoption of the above section, however, Congress ordained a different rule, and amendments are now generally allowed at any time in the courts discretion.⁷ The power to amend, thus conferred, is a very liberal one, and hence it is not a fatal objection to the amendment that more than six months have elapsed since the decree sought to be remedied was pronounced.⁸ While conferred in

¹Havnor v. New York, 170 U. S. 408, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631. See also Butler v. Gage, 138 U. S. 55, 34 L. ed. 871, 11 Sup. Ct. Rep. 235.

²Palmer v. Donner, 7 Wall. 541, 19 L. ed. 99.

³Act June 1, 1872, c. 255, § 3, 17 Stat. 196.

⁴Ante, § 813.

⁵Mossman v. Higginson, 4 Dall. 12, 1 L. ed. 720.

⁶Course v. Stead, 4 Dall. 22, 1 L. ed. 724.

⁷Insurance Co. v. Mordecai, 21

How. 195, 16 L. ed. 94; Porter v. Foley, 21 How. 393, 16 L. ed. 154.

⁸Wilson's Heirs v. Life Ins. Co. 12 Pet. 140, 9 L. ed. 1032; Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879; Miller v. McKenzie, 10 Wall. 582, 19 L. ed. 1043; Missina v. Cava-zos, 6 Wall. 355, 18 L. ed. 810; The Protector, 11 Wall. 82, 20 L. ed. 47.

⁹See Walton v. Marietta Chair Co. 157 U. S. 346, 39 L. ed. 727, 15 Sup. Ct. Rep. 626; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436.

¹⁰Cotter v. Alabama, etc. R. Co.

61 Fed. 747, 10 C. C. A. 35.

terms upon the Supreme Court the circuit court of appeals is held to have similar power with respect to writs issuing therefrom.⁹

[b] All matters of form amendable.

The theory of the above section is that a colorable writ shall operate as a writ of error the court being given power to amend it in so far as it is informal.¹¹ Hence, amendments have been allowed where the writ bears the wrong teste and seal,¹² or lacks the impression of the seal of the court,¹³ or contains the wrong return day¹⁴ or omits to state it with certainty¹⁵ or contains no return day at all.¹⁶ Amendments will be allowed also where the parties to the suit are erroneously described,¹⁷ or where parties are improperly omitted¹⁸ or included.¹⁹ So also the absence of formal petition for the writ of error and formal allowance thereof are defects which are amendable under this section,²⁰ as is also a failure to attach the writ of error to the transcript on return.¹ Where, however, the alleged writ is not even colorably issued as where it is issued in the name and bears the teste of a State chief justice, and is signed and sealed by the clerk of the State court but not in the name of the President or under the authority of the United States, it cannot be amended.² Application to amend, is necessary and where there is no such application, no order to amend will be made.³

[c] Amendments not allowed when prejudicial to defendant in error.

Since the amendment rests in the discretion of the court, it will not be allowed if there is any danger of prejudice to the adverse party or if there is any other good reason against it, as for instance that the main question presented by the record had been frequently determined by the

⁹Cotter v. Alabama, etc. R. Co. 61 Fed. 748, 10 C. C. A. 35.

¹¹Cotter v. Alabama, etc. R. Co. 61 Fed. 747, 10 C. C. A. 35.

¹²Texas, etc. R. Co. v. Kirk, 111 U. S. 486, 28 L. ed. 481, 4 Sup. Ct. Rep. 500.

¹³Burnham v. North Chicago, etc. R. Co. 87 Fed. 168, 30 C. C. A. 594.

¹⁴Hampton v. Rouse, 15 Wall. 684, 21 L. ed. 250; Semmes v. United States, 91 U. S. 21, 23 L. ed. 193; National Bank v. Bank of Commerce, 99 U. S. 608, 25 L. ed. 362.

¹⁵Sea v. Connecticut etc. Ins. Co. 154 U. S. 659, 25 L. ed. 882, 14 Sup. Ct. Rep. 1191.

¹⁶Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265; Evans v. Brown, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 83.

¹⁷Moore v. Simonds, 100 U. S. 145, 25 L. ed. 590; Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct.

Rep. 616; Estis v. Trabue, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58; United States v. Schoverling, 146 U. S. 76, 36 L. ed. 893, 13 Sup. Ct. Rep. 24; Pacific Bank v. Mixter, 114 U. S. 463, 29 L. ed. 221, 5 Sup. Ct. Rep. 944.

¹⁸Knickerbocker, etc. Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 419, 6 Sup. Ct. Rep. 74. See however, infra, note.[c]

¹⁹Walton v. Marietta Chair Co. 157 U. S. 342, 39 L. ed. 725, 15 Sup. Ct. Rep. 626; McPhaul v. Lapsley, 20 Wall. 282, 22 L. ed. 346.

²⁰Alaska, etc. Min. Co. v. Keating, 116 Fed. 561, 53 C. C. A. 655.

¹Cotter v. Alabama, etc. R. Co. 61 Fed. 747, 10 C. C. A. 35.

²Bondurant v. Watson, 103 U. S. 278, 26 L. ed. 447.

³Sea v. Connecticut etc. Ins. Co. 154 U. S. 659, 25 L. ed. 882, 16 Sup. Ct. 1191.

Supreme Court.⁵ An amendment will be refused also where a necessary party defendant has not been joined or severed for failure or refusal to join.⁶

§ 1929. Appeals subject to same rules as writs of error.

Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

R. S. § 1012, U. S. Comp. Stat. 1901, p. 716.

The rules, regulations and restrictions respecting the time in which a writ of error may be brought,⁸ in what instances it may operate as a supersedeas, the citation to the adverse party, the security to be given, and the restrictions as to reversals, all apply by virtue of this section, to appeals.⁹ The section does not, however, have the effect of making a finding and statement of facts by a trial court in an equity cause conclusive on the appellate court.¹⁰ But they are presumptively correct and will not be disturbed on appeal, unless it appears that they are opposed to the weight of evidence or unless some error is clearly shown.¹¹

§ 1930. Assignment of errors on appeal direct to Supreme Court.

Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court,¹² under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors,^[a] which shall set out separately and particularly each error asserted and intended to be urged.^[b] No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or rejection of evidence, the assignment of errors shall quote the full

⁵Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436.

⁶Copeland v. Waldron, 133 Fed. 217, 66 C. C. A. 271. And see Estis v. Trabue, 128 U. S. 229, 32 L. ed. 437, 9 Sup. Ct. Rep. 58.

⁸Credit Co. v. Arkansas, etc. Ry. Co. 128 U. S. 261, 32 L. ed. 450, 9 Sup. Ct. Rep. 107; Villabolas v. United States, 6 How. 81, 12 L. ed. 352; The San Pedro, 2 Wheat. 132, 4 L. ed. 203.

⁹The San Pedro, 2 Wheat. 132, 4 L. ed. 203.

¹⁰Hendryx v. Perkins, 123 Fed. 268, 59 C. C. A. 266.

¹¹Heinze v. Butte, etc. Co. 126 Fed. 1, 61 C. C. A. 63; Board of Comm'rs. v. Irvine, 126 Fed. 689, 61 C. C. A. 607; Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475, and cases cited.

¹²See ante, § 42.

substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, totidem verbis, whether it be in instructions given, or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.^[c]

§ 1, Supreme Court Rule 35 as adopted May 11, 1891.¹³

[a] Assignments of error—necessity therefor.

In general, only questions specified in the assignment of errors may be raised by appellant or plaintiff in error.¹⁴ Hence, assignments of error as to the admission or rejection of evidence are necessary, in order that the holding of the lower court on that point may be reviewed;¹⁵ and findings though excepted to, cannot be reviewed without an assignment of error.¹⁶ R. S. § 997¹⁷ requires assignment of errors to be filed with the writ of error. But assignments of error cannot be used to import questions into a cause which the record does not show were raised.¹⁸ Assignments of error respecting questions not saved by the bill of exceptions at jury trial cannot be considered on error.¹⁹ In an equity suit, however, where the jury's verdict is advisory only, an assignment of errors based upon a refusal of instructions, cannot be considered.²⁰

[b] Each error to be set forth separately.

Errors assigned must be separately set forth and when alleged to the charge of the trial court, the part referred to must be set out totidem verbis.¹ So specifications of error based on the modification of an instruction without showing the nature of the modification will be disregarded.²

[c] Court may notice error not assigned.

The supreme court will not necessarily dismiss an appeal because there

¹³139 U. S. 705.

¹⁴Scholey v. Rew, 23 Wall. 345, 22 L. ed. 99.

¹⁵Marshall v. Burtis, 172 U. S. 634, 43 L. ed. 581, 19 Sup. Ct. Rep. 290.

¹⁶Post, § 1953.

¹⁷Fox v. Haarstick, 156 U. S. 678, 39 L. ed. 578, 15 Sup. Ct. Rep. 457.

¹⁸Ansbro v. United States, 159 U. S. 698, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Missouri, etc. Ry. v. Fitz-

gerald, 160 U. S. 575, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

¹⁹Canal, etc. St. R. R. Co. v. Hart, 114 U. S. 663, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127.

²⁰McKinley Min. Co. v. Alaska Min. Co. 183 U. S. 569, 46 L. ed. 334, 22 Sup. Ct. Rep. 84.

¹Turnbull v. Payson, 95 U. S. 420, 24 L. ed. 437.

²United States v. Gilmore, 7 Wall. 495, 19 L. ed. 282.

were no assignments of error annexed to the transcript, since it may at its option notice a plain error not assigned.³ The general rule is however that errors not assigned will be disregarded.⁴

§ 1931. — on appeal to circuit court of appeals.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, and assignment of errors,^{[a]-[b]} which shall set out separately and particularly each error asserted and intended to be urged.^[c] No writ of error or appeal shall be allowed until such assignment of errors shall have been filed.^[d] When the error alleged is to the admission or rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected.^[e] When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused.^[f] Such assignment of errors shall form a part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.^[g]

Rule 11, circuit court of appeals, in force in all circuits.

[a] Assignment of errors—in general.

Assignments of error are necessary both on appeal and writ of error.⁶ In preparing them the above rule should be strictly followed.⁷ They should so present the matter that the court may understand the question it is called upon to decide without going beyond the assignments themselves.⁸ Hence an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented.⁹ It should be directed to the rulings of the court, but should not be in the form of an elaborate argument that the court erred in its decision;¹⁰ nor should it state that the evidence showed this or that, but should specify that the decree is erroneous in certain particulars separately stated.¹¹ So too, the assignment of errors need not state that

³See post, § 2069; *United States v. Pena*, 175 U. S. 502, 44 L. ed. 252, 20 Sup. Ct. Rep. 165; *United States v. Tennessee, etc. R. R.* 176 U. S. 256, 44 L. ed. 458, 20 Sup. Ct. Rep. 370.

⁴Post § 2069.

⁶*Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353.

⁷*Walton v. Mining Co.* 123 Fed. 211, 60 C. C. A. 155.

⁸*Van Gunden v. Iron Co.* 52 Fed. 838, 3 C. C. A. 294.

⁹*Grape Creek, etc. Co. v. Farmers, etc. Co.* 63 Fed. 891, 12 C. C. A. 350.

¹⁰*Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353; *Atchison, etc. R. Co. v. Meyers*, 76 Fed. 445, 22 C. C. A. 268.

¹¹*Andrews v. Pipe Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L.R.A. 139.

exceptions were taken to refusals of the court to charge as requested, as such statements, while necessary in the bill of exceptions, only encumber the record on assignment of error.¹² Where, however, no bill of exceptions has been signed and filed, statements made in the assignment of errors as to rulings of the court,¹³ or as to instructions given and exceptions taken thereto,¹⁴ cannot be accepted as sufficient proof of the facts alleged, to warrant a reversal. So also a statement in the assignment of errors of the grounds of an objection to the admission of evidence, is not sufficient where such grounds were not stated in the bill of exceptions,¹⁵ and in general, assignments of error based upon evidence which although printed in the record, is not contained in the bill of exceptions, or otherwise authenticated, will not be considered.¹⁶ A defendant in error who does not sue out a writ of error cannot, by assigning cross errors, confer jurisdiction on the appellate court to determine questions not otherwise presented.¹⁷

The omission to set out in the title of the assignment of error the names of all the parties to the record whose interests are intended to be, and manifestly may be, affected by the appeal, does not affect the jurisdiction of the court over the parties whose names were omitted.¹⁸ An assignment of errors is waived by failure of the opposite party to refer to it in his brief.¹⁹ The filing of the petition, the order and the assignment of errors at the same time is a sufficient compliance with this section.²⁰

[b] — statements in courts opinion, not assignable.

Since the opinion of the trial court is no part of the record,¹ assignments of error which are predicated thereon or reasons given by the court for its ruling or decree, are not assignable.²

[c] — errors to be set forth separately and distinctly alleged.

Assignments of error, to be considered, should be set forth separately.³ They are required by the rules to point out the specific ground of error

¹²Atchison, etc. R. Co. v. Meyers, 76 Fed. 445, 22 C. C. A. 268.

¹³Woodbury v. Shawneetown, 74 Fed. 206, 20 C. C. A. 400.

¹⁴Lincoln, etc. Safe Deposit Co. v. Allen, 82 Fed. 148, 27 C. C. A. 87.

¹⁵North Chicago, etc. Railroad Co. v. St. John, 85 Fed. 806, 29 C. C. A. 634.

¹⁶Lee Won Jeong v. United States, 145 Fed. 513, (C. C. A.).

¹⁷Guarantee Co. v. Phenix Ins. Co. 124 Fed. 170, 59 C. C. A. 376.

¹⁸Andrews v. Pipe Works, 76 Fed. 166, 22 C. C. A. 110, 39 L.R.A. 139.

¹⁹Texas, etc. Railroad Co. v. Reeder, 76 Fed. 550, 22 C. C. A. 314.

²⁰Copper, etc. Co. v. McClellan, 138 Fed. 333, 70 C. C. A. 623.

¹North American, etc. Co v. Colonial, etc. Co. 83 Fed. 803, 28 C. C. A. 88.

²Russell v. Kern, 69 Fed. 94, 16 C. C. A. 154; Caverly v. Deere, etc. Co. 66 Fed. 305, 13 C. C. A. 452; Evans v. Glass Company, 83 Fed. 706, 28 C. C. A. 24; Clark v. Deere, etc. Co. 80 Fed. 534, 25 C. C. A. 619; Mutual Res. Fund Ass'n. v. DuBois, 85 Fed. 586, 29 C. C. A. 354; North American, etc. Co. v. Colonial, etc. Co. 83 Fed. 796, 28 C. C. A. 88; McFarlane v. Golding, 76 Fed. 23, 22 C. C. A. 23; Columbus Safe Deposit Co. v. Burke, 88 Fed. 630, 32 C. C. A. 67.

³Davidson S. S. Co. v. United States, 142 Fed. 315, (C. C. A.).

relied on, hence a mere general assignment is not sufficient.⁴ Thus assignments which merely allege error in making certain decrees without pointing out in what the error consisted are not sufficient.⁵ So a general assignment that the court erred in rendering judgment against the defendant cannot be considered.⁶ So also a general assignment of error as to the courts charge to the jury, or the refusal to instruct, is of no avail where such charge or instructions contain several propositions.⁷ The same is true of a general assignment of error as to the admission or rejection of evidence.⁸ Likewise, where a demurrer, based on several different grounds, is overruled, a mere general assignment that the court erred in overruling the demurrer, without specifying any particular ground of demurrer as wrongly ruled, is not sufficiently specific.⁹ But where various errors are complained of, presenting a single proposition of law common to all of them they need not be separately stated as so many distinct propositions.¹⁰

[d] — necessity of filing—time.

In all cases of appeals, whether in equity, admiralty, or law, the failure to file an assignment of errors is good ground for dismissal.¹² The rule requires that the filing be done before the writ of error or appeal is allowed, and hence when not done until afterward the appellate court will not review the judgment.¹³ There are two reasons for this rule as to filing, first that the opposing counsel and the appellate court may be informed as to what questions of law are to be presented, and second that, if the review be on writ of error, the court may decide as to whether or not the writ should be issued.¹⁴ The second reason does not apply to appeals since they issue as of right.¹⁵ The only question before the trial court in such

⁴Hart v. Bowen, 86 Fed. 877, 31 C. C. A. 31.

⁵Florida, etc. Railroad Co. v. Cutting, 68 Fed. 586, 15 C. C. A. 597; Doe v. Mining Co. 70 Fed. 455, 17 C. C. A. 190; Supreme Lodge K. of P. v. Withers, 89 Fed. 160, 32 C. C. A. 182.

⁶United States v. Ferguson, 78 Fed. 103, 24 C. C. A. 1; Hart v. Bowen, 86 Fed. 877, 31 C. C. A. 31; Louisiana, etc. R. Co. v. Board of Com'rs. 87 Fed. 594, 31 C. C. A. 121; McDonald v. United States, 63 Fed. 426, 12 C. C. A. 339.

⁷Sutherland v. Brace, 71 Fed. 469, 18 C. C. A. 199; Pickham v. Manufacturing Co. 77 Fed. 663, 23 C. C. A. 391.

⁸Oswego v. Travelers Ins. Co. 70 Fed. 225, 17 C. C. A. 77; National Bank v. First Nat. Bank, 61 Fed. 809, 10 C. C. A. 87; Davidson S. S. Co. v. United States, 142 Fed. 315,

(C. C. A.). See also Crossby v. Emerson, 142 Fed. 713, (C. C. A.).

⁹Anniston v. Safe-Deposit, etc. Co. 85 Fed. 856, 29 C. C. A. 457.

¹⁰Central Trust Co. v. Continental Trust Co. 86 Fed. 517, 30 C. C. A. 235. See also, Andrews v. Pipe Works, 76 Fed. 166, 22 C. C. A. 110, 36 L.R.A. 139.

¹²Dufour v. Lang, 54 Fed. 913, 4 C. C. A. 653; Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621.

¹³Union Pac. Ry. v. Colorado, etc. Ry. 54 Fed. 22, 4 C. C. A. 161; United States v. Goodrich, 54 Fed. 21; 4 C. C. A. 160; Flahrity v. Railway Co. 56 Fed. 908, 6 C. C. A. 167; Crabtree v. McCurtain, 61 Fed. 808, 10 C. C. A. 86; Mutual Life Insurance Co. v. Conoley, 63 Fed. 180, 11 C. C. A. 116.

¹⁴Simpson v. Bank, 129 Fed. 258, 63 C. C. A. 371.

¹⁵Ibid.

a case is as to the sufficiency of the security. Hence it is held that the filing of the assignments is in time if made on or before the time of the filing of the bond, which is the perfecting of the appeal.¹⁶ The fact that the file mark on the assignments bears a later date than that of the writ of error¹⁷ or the fact that there is no file mark,¹⁸ does not justify dismissal, where it appears that the former was in fact presented on the same date as the application for the writ. The granting of additional time by the trial court for filing assignments of error does not take the case out of this section.¹⁹ An assignment of errors is "filed with the petition" within the meaning of the rule, when the plaintiff in error incorporates the errors complained of into the petition for appeal and the petition is then filed with the clerk.²⁰

[e] Assignment to quote full substance of evidence admitted or rejected.

Under the above provision, alleged errors on the admission or exclusion of evidence will not be considered unless the testimony alleged to have been erroneously admitted or excluded is substantially set forth in the assignment of errors.¹ It would seem that the evidence should be actually set forth and hence an assignment that the court erred in admitting or rejecting evidence contained in a certain paper, "as set forth in the bill of exceptions," will not be considered,² especially where such error can be ascertained only by the careful reading of a voluminous record.³

There is no difficulty in applying the rule, either to evidence admitted, whether documentary or oral, or to evidence refused which is documentary. The difficulty arises where oral evidence is refused since there is no means of knowing what such evidence would have been. Such a case usually arises on the refusal of the court to allow a witness to answer questions.⁴ The better practice is to set forth in the bill of exceptions that evidence which the answer was supposed to elicit,⁵ and such evidence should be incorporated into the assignments of error.⁶

¹⁶Ibid; *Lockman v. Lang*, 132 Fed. 1, 65 C. C. A. 621.

¹⁷*Tyee, etc. Min. Co. v. Langstedt*, 121 Fed. 711, 58 C. C. A. 129.

¹⁸*Moore v. Moore*, 121 Fed. 737, 58 C. C. A. 19.

¹⁹*Mutual Life Insurance Co. v. Conoley*, 63 Fed. 180, 11 C. C. A. 116.

²⁰*Central Trust Co. v. Continental Trust Co.* 86 Fed. 517, 30 C. C. A. 235.

¹*Haldane v. United States*, 69 Fed. 819, 16 C. C. A. 447; *American Nat. Bank v. Wall Paper Co.* 77 Fed. 85, 23 C. C. A. 33; *Newman v. Iron Co.* 80 Fed. 228, 25 C. C. A. 382; *Schradsky v. Stimson*, 76 Fed. 730, 22 C. C. A. 515; *Lincoln, etc. Safe Deposit Co. v. Allen*, 82 Fed. 148, 27 C. C. A. 87; *National Bank of Commerce v.*

First Nat. Bank, 61 Fed. 809, 10 C. C. A. 87.

²*Atlas Distilling Co. v. Rheinstrom*, 86 Fed. 244, 30 C. C. A. 10.

³*Gallot v. United States*, 87 Fed. 446, 31 C. C. A. 44.

⁴*United States v. Indian, etc. Dist.* 85 Fed. 931, 29 C. C. A. 578.

⁵*United States v. Indian, etc. Dist.* 85 Fed. 931, 29 C. C. A. 578. And see *Turner v. United States*, 66 Fed. 289, 13 C. C. A. 445; *American Nat. Bank v. National Wall Paper Co.* 77 Fed. 85, 23 C. C. A. 33; *Railroad Co. v. Smith*, 21 Wall. 261, 22 L. ed. 514; but see *Buckstaff v. Russell*, 151 U. S. 636, 38 L. ed. 296, 14 Sup. Ct. Rep. 452.

⁶See *United States v. Indian, etc. Dist.* 85 Fed. 931, 29 C. C. A. 578;

[f] Assignment to set out instructions totidem verbis.

The error alleged being to the charge of the court, failure of the assignment to set out the part referred to totidem verbis whether it be in instructions given or refused is fatal to review on appeal.⁸ Hence an assignment that "the court erred in its charge" etc., referring to marked lines and numbers in the written opinion, will not be considered.⁹

[g] Plain errors not assigned, may be noticed.

While it is the usual rule that errors not properly assigned will be disregarded, such rule is not strictly enforced in the case of a failure to assign or a defective assignment of a plain error.¹¹ Thus a plain error may be considered by the reviewing court where the merits have been fully considered below and discussed in the brief of one of the parties.¹² So also the refusal of an instruction may be considered although improperly assigned, where counsel have argued it on its merits and impliedly given the court to understand that it raised a substantial issue.¹³ Likewise the reviewing court has considered an erroneous instruction improperly assigned in view of the far reaching consequences of the verdict and special circumstances arising at the trial.¹⁴ But the court will not depart from the strict rule in order to notice an error which is technical and probably immaterial.¹⁵ The question of laches, though not considered in the trial court and no assignment of error made, will be considered on appeal.

§ 1932. Bill of exceptions and authentication.

A bill of exceptions ^{[a]-[c]} allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried,^[d] or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions,^[e] then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried,

Turner v. United States, 66 Fed. 289, 13 C. C. A. 445.

⁸McClellan v. Pyeatt, 50 Fed. 686, 1 C. C. A. 613; Prichard v. Budd, 76 Fed. 710, 22 C. C. A. 504; Mitchell v. Marker, 62 Fed. 140, 10 C. C. A. 306, 25 L.R.A. 33; Haldane v. United States, 69 Fed. 819, 16 C. C. A. 447.

⁹Gallot v. United States, 87 Fed. 446, 31 C. C. A. 44.

¹¹George v. Wallace, 135 Fed. 286, 68 C. C. A. 40; Flagler v. Kidd, 78 Fed. 342, 24 C. C. A. 123; Russell

v. Manufacturing Co. 83 Fed. 976, 28 C. C. A. 243.

¹²Flagler v. Kidd, 78 Fed. 342, 24 C. C. A. 123.

¹³Chapman v. Reynolds, 77 Fed. 274, 23 C. C. A. 166.

¹⁴Western N. C. Land Co. v. Scaife, 80 Fed. 352, 25 C. C. A. 461.

¹⁵Atchison etc. Railroad Co. v. Mulligan, 67 Fed. 569, 14 C. C. A. 547; National Acc. Society v. Spiro, 78 Fed. 774, 24 C. C. A. 334.

¹⁶Shea v. Nilima, 133 Fed. 215, 66 C. C. A. 263 and cases cited.

holding such court thereafter, if the evidence in such case has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor.

R. S. § 953 as amended June 5, 1900, U. S. Comp. Stat. 1901, p. 696.

[a] Bill of exceptions—allowance and filing thereof regulated by Federal practice.

The amendment of 1900 consisted in the addition of everything after the it aid in determining that question.¹⁹ Neither has it any reference to an first sentence. The only statutory regulation of bills of exception is contained in the above section,¹⁸ which neither in terms, nor by implication, limits the time within which exceptions shall be filed or allowed, nor does application to extend the time to make, file and serve a bill of exceptions.²⁰ These questions are determined by the Federal courts for themselves and without regard to the state practice.¹

[b]—what to contain.

A ruling of the trial court can be reviewed on appeal only when challenged by an exception.³ The bill of exceptions should be on some point of law, either in admitting or denying evidence or a challenge on some point of law arising on facts not denied, in which either party is overruled by the court.⁴ It should contain only the rulings of the court upon matters of law with only so much of the testimony as may be necessary to

¹⁸Chateaugay, etc. Co. Petitioner, 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; Duncan v. Landis, 106 Fed. 844, 45 C. C. A. 666.

¹⁹New York, etc. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.

²⁰Talbot v. Press Pub. Co. 80 Fed. 567; United States v. Breitling, 20 How. 252, 15 L. ed. 900. See New York, etc. R. Co. v. Hyde, 56 Fed. 189, 5 C. C. A. 461; Scaife v. Western, etc. Land Co. 87 Fed. 310, 30 C. C. A. 661.

¹New York, etc. R. Co. v. Hyde, 56 Fed. 189, 5 C. C. A. 461; Chateaugay, etc. Co. Petitioner, 128 U. S. 553, 555, 32 L. ed. 512, 9 Sup. Ct. Rep. 150. See also Manning v. German Ins. Co. 107 Fed. 52, 46 C. C. A. 144. See also Fishburn v. Railway Co. 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8.

³Potter v. United States, 122 Fed. 49, 58 C. C. A. 231, and cases cited.

⁴Scaife v. Western, etc. Land Co. 87 Fed. 310, 30 C. C. A. 661; Ex parte Crane, 5 Pet. 190, 8 L. ed. 93.

explain the bearing of the rulings upon the issues involved.⁵ But the incorporation of the evidence relating to the question sought to be raised in the bill of exceptions, is essential and should be strictly complied with.⁶ Hence an alleged bill of exceptions which contains the findings, the requests and refusals to find with occasional entries stating that plaintiff excepts, but not in fact, stating the ruling, the exception, or the grounds for either is not sufficient to allow the court to review the questions sought to be raised.⁷ Each bill of exceptions must be considered as presenting a substantial case and it is the evidence stated in it alone on which the court will decide.⁸ However, evidence may be included in a bill of exceptions by appropriate reference to other parts of the record.⁹ It should not contain all the evidence¹⁰ even though the consent of counsel be obtained,¹¹ nor should it set forth the charge of the court in full, but only those parts to which exceptions are taken.¹² The bill of exceptions should point out the alleged errors clearly and show the grounds relied upon to sustain the objections presented, so that it may appear that the court below was informed as to the point to be decided.¹³ But the bill of exceptions does not confine the appellate court to matters embraced therein, any error apparent in any part of the record being within the revisory power of such court.¹⁴ Exceptions will not lie to the granting or refusing of a new trial,¹⁵ nor to the granting of a new trial nisi.¹⁶

[bb] — in the seventh circuit.

In the seventh circuit it is expressly provided by rule 10, that "a bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review,

⁵Lincoln v. Claffin, 7 Wall. 136, 19 L. ed. 108; Laber v. Cooper, 7 Wall. 568, 19 L. ed. 152; Duncan v. The Francis Wright, 105 U. S. 381, 26 L. ed. 1100; Scaife v. Western, etc. Land Co. 87 Fed. 310, 30 C. C. A. 661; Southwest Va. Improvement Co. v. Frari, 58 Fed. 171, 7 C. C. A. 149.

⁶Newport News, etc. Co. v. Yount, 136 Fed. 589, 69 C. C. A. 363, and cases cited.

⁷Marion, etc. Co. v. Cummer, 60 Fed. 876, 9 C. C. A. 279.

⁸Dunlop v. Munroe, 7 Cranch, 270, 3 L. ed. 339; Jones v. Buckell, 104 U. S. 556, 26 L. ed. 842.

⁹Jones v. Buckell, 104 U. S. 556, 26 L. ed. 842.

¹⁰Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551.

¹¹Graham v. Bayne, 18 How. 60, 15 L. ed. 265.

¹²United States v. Rindskopf, 105 U. S. 418, 26 L. ed. 1131. See also, post, § 1933.

¹³Duncan v. The Francis Wright, 105 U. S. 389, 26 L. ed. 1100; Marion, etc. Co. v. Cummer, 60 Fed. 878, 9 C. C. A. 279. See also The Gazelle, 128 U. S. 486, 32 L. ed. 499, 9 Sup. Ct. Rep. 142; City of Key West, v. Baer, 66 Fed. 445, 13 C. C. A. 572.

¹⁴Scaife v. Western, etc. Land Co. 87 Fed. 311, 30 C. C. A. 661; Suydam v. Williamson, 20 How. 433, 15 L. ed. 978; Aurora City v. West, 7 Wall. 91, 19 L. ed. 46; Young v. Martin, 8 Wall. 354, 19 L. ed. 418.

¹⁵Railroad Co. v. Winter, 143 U. S. 75, 36 L. ed. 80, 12 Sup. Ct. Rep. 356; Arkansas Cattle Co. v. Mann, 130 U. S. 75, 32 L. ed. 856, 9 Sup. Ct. Rep. 458. See also Insurance Co. v. Folsom, 18 Wall. 257, 21 L. ed. 835; Railroad Co. v. Fra-loff, 100 U. S. 24, 25 L. ed. 531.

¹⁶Northern Pac. Railroad Co. v. Herbert, 116 U. S. 642, 29 L. ed. 757, 6 Sup. Ct. Rep. 590.

and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

"No document shall be copied more than once in a bill of exceptions . . . but instead there shall be inserted a reference to the one copy set out, . . ." ¹⁷

[c] Bill to be signed during term.

The rule seems well established both in the Supreme Court and in the circuit court of appeals that the bill of exceptions must be signed during the term at which the case was tried, and when this is not done the bill will not be considered on error in the absence of extraordinary circumstances,¹⁸ or unless the time is extended by express order,¹⁹ or by the parties consent.²⁰ In such case however the bill should contain a distinct statement showing that consent, or the written agreement of consent should be indorsed on or attached to the bill.¹ But where motion for new trial is duly filed but not acted upon at trial term, but stay of execution is granted, it is held that a bill of exceptions may be settled and filed at the term in which the motion for a new trial is determined.² Where there are extraordinary circumstances, however, the general rule is not strictly applied.³ Thus where the delay is caused by the court and not by the parties, the bill may be signed after the trial term.⁴ An amendment to the bill will be refused at a subsequent term where the errors sought to be corrected are due to the party's own neglect.⁵ Where the judge dies leaving motion for a new trial pending and there is no record from which his successor may pass upon the same and sign a true bill of exceptions, his only authority is to grant a new trial.⁶ A bill of exceptions being duly allowed

¹⁷Clause 2 and part of clause 3 of C. C. A. Rule 10 in the seventh circuit, printed in full in the appendix I E; also in 91 Fed. v. clause 1, of the rule is identical with the next Code section.

¹⁸Muller v. Ehlers, 91 U. S. 251, 23 L. ed. 319; Jones v. Grover, etc. Co. 131 U. S. CL. (Appendix) 24 L. ed. 925; United States v. Jones, 149 U. S. 263, 37 L. ed. 726, 13 Sup. Ct. Rep. 840; Morse v. Anderson, 150 U. S. 158, 37 L. ed. 1037, 14 Sup. Ct. Rep. 44; Richmond, etc. R. R. v. McGee, 50 Fed. 907, 2 C. C. A. 81; United States v. Kelly, 89 Fed. 950, 32 C. C. A. 441; Irvine v. Angus, 93 Fed. 629, 35 C. C. A. 501; Michigan, etc. Bank v. Eldred, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 452; Davis v. Patrick, 122 U. S. 143, 30 L. ed. 1091, 7 Sup. Ct. Rep. 1102.

¹⁹Ward v. Cochran, 150 U. S. 603, 37 L. ed. 1196, 14 Sup. Ct. Rep. 231; Yellow, etc. Lumber Co. v. Chapman,

74 Fed. 451, 20 C. C. A. 503; Koewing v. Wilder, 126 Fed. 474.

²⁰Waldron v. Waldron, 156 U. S. 378, 39 L. ed. 453, 15 Sup. Ct. Rep. 383. See United States v. Train, 12 Fed. 854.

¹Reliable, etc. Co. v. Stahl, 102 Fed. 593, 42 C. C. A. 522.

²Merchants Ins. Co. v. Buckner, 98 Fed. 224, 39 C. C. A. 19; Woods v. Lindvall, 48 Fed. 73, 1 C. C. A. 34.

³Western, etc. Co. v. Heldmaier, 53 C. C. A. 625, 116 Fed. 182. See also United States v. Breitling, 20 How. 252, 15 L. ed. 900.

⁴Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1102; In re Chateaugay, etc. Co. 128 U. S. 555, 32 L. ed. 512, 9 Sup. Ct. Rep. 153; Western, etc. Co. v. Heldmaier, 116 Fed. 182, 53 C. C. A. 625. Illness of trial judge, Roberts v. Benett, 135 Fed. 748, 68 C. C. A. 386.

⁵Adams v. Shirk, 121 Fed. 823, 58 C. C. A. 159.

and certified it is immaterial that the evidence embodied therein was taken down and embodied therein by a stenographer employed by the parties and not by order of the court.⁷

[d] Signature sufficient authentication.

The provisions of this section dispense with the necessity of a bill of exceptions being sealed.⁹ Signature is still necessary and initials only, are not sufficient.¹⁰ The signature cannot be dispensed with by an agreement of counsel, nor can they agree that the signing be done by another than the trial judge.¹¹ The bill having been properly settled and certified by the trial court it will not be stricken from the records because not filed or served according to the circuit court rules.¹²

[e] What constitutes disability.

The disability of a judge under this section means a physical or mental disability arising from either death, sickness, insanity or disorder of like character by reason of which the judge would be unable to perform his judicial functions. Mere absence from the district or circuit in which the case was tried, is not such disability as to allow the signing of a bill of exceptions by a judge other than the trial judge.¹³

§ 1933. — general exceptions to court's instructions not allowed.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge.^[a] But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts;^{[b]-[c]} and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

Supreme court rule 4, as revised Dec. term, 1858,¹⁵ and circuit court of appeals rule 10,¹⁶ in force in all circuits.

[a] General exception to charge insufficient.

The practice of bringing the whole charge of the court below before the supreme court was early disapproved,¹⁷ and is now forbidden by the above

⁶Penn, etc. Ins. Co. v. Ashe, 145 Fed. 593, (C. C. A.).

⁷St Louis Etc. Ry. v. Purcell, 135 Fed. 499, 68 C. C. A. 211.

⁹Origet v. United States, 125 U. S. 240, 31 L. ed. 743, 8 Sup. Ct. Rep. 846.

¹⁰Idem.

¹¹Maloney v. Adsit, 175 U. S. 281, 44 L. ed. 163, 20 Sup. Ct. Rep. 115; See Niver v. Fields, 179 U. S. 682, 45 L. ed. 384, 21 Sup. Ct. Rep. 919.

¹²Seattle v. Board of Home Missions, 138 Fed. 307, 70 C. C. A. 597.

¹³Western, etc. Co. v. Heldmaier, 111 Fed. 123, 49 C. C. A. 264.

¹⁵21 How. vi.

¹⁶47 Fed. vi. 1 C. C. A. xiv.

¹⁷Carver v. Jackson, 4 Pet. 80, 7 L. ed. 761; Conard v. Pacific Ins. Co. 6 Pet. 280, 8 L. ed. 392. See Gregg v. Sayre, 8 Pet. 251, 8 L. ed. 932.

rule.¹⁸ It is mandatory and cannot be waived by the trial judge even if he desires to do so.¹⁹ It is well established that a general exception to the whole of the charge is unavailing if any portion of it states the law correctly,²⁰ and such defect cannot be remedied in the assignments of error.¹ Upon the same principle, where a series of propositions in the judges charge are excepted to in gross, and any portion thus excepted to, is sound, the exception cannot be sustained.² Thus, general exceptions to the courts instructions and to each and every part thereof are insufficient.³ So also an exception to so much of a charge "as requires the evidence should show that there was an intention to deceive," is too general for consideration.⁴ Where exceptions are taken to a refusal to charge, the same rule applies and a general exception taken to a refusal of a series of instructions will not be considered if any of the propositions are unsound.⁵

[b] Exceptions to be distinctly stated and brought to trial courts attention.

It is the duty of the party excepting to call the attention of the trial court distinctly to that part of the charge to which he excepts, thereby affording the court an opportunity for explanations and qualifications,⁷ and where this is not done the exceptions cannot be considered on appeal.⁸

[c] Must be taken before jury.

The exceptions must be taken before the cause is submitted to the jury, so that the court may correct or explain the parts of the charge excepted to

¹⁸*Magniac v. Thompson*, 7 Pet. 390, 8 L. ed. 709; *Price v. Parkhurst*, 53 Fed. 312, 3 C. C. A. 551.

¹⁹*Price v. Parkhurst*, 53 Fed. 313, 3 C. C. A. 551.

²⁰*Beaver v. Taylor*, 93 U. S. 46, 23 L. ed. 797; *Chateaugay Iron Co. v. Blake*, 144 U. S. 476, 30 L. ed. 510, 12 Sup. Ct. Rep. 731; *Anthony v. Louisville, etc. Railroad Co.* 132 U. S. 172, 33 L. ed. 302, 10 Sup. Ct. Rep. 53; *Mobile, etc. Railway Co. v. Jurey*, 111 U. S. 596, 28 Fed. 532, 4 Sup. Ct. Rep. 566; *Cooper v. Schlesinger*, 111 U. S. 151, 28 L. ed. 383, 4 Sup. Ct. Rep. 360; *Lincoln v. Claffin*, 7 Wall. 139, 19 L. ed. 109; *Masonic, etc. Ass'n. v. Lyman*, 60 Fed. 500, 9 C. C. A. 104; *Thom v. Pittard*, 62 Fed. 235, 10 C. C. A. 352; *Price v. Parkhurst*, 53 Fed. 312, 3 C. C. A. 551; *United States v. Rossi*, 133 Fed. 380, 66 C. C. A. 442.

¹*Newman v. Iron Co* 80 Fed. 234, 25 C. C. A. 382.

²*Beaver v. Taylor*, 93 U. S. 54, 23

L. ed. 798; *Vider v. O'Brien*, 62 Fed. 326, 10 C. C. A. 385.

³*Baggs v. Martin*, 108 Fed. 34, 47 C. C. A. 175; *Block v. Darling*, 140 U. S. 238, 35 L. ed. 476, 11 Sup. Ct. Rep. 832; *Jones v. East Tenn., etc. R. R.* 157 U. S. 683, 39 L. ed. 858, 15 Sup. Ct. Rep. 719.

⁴*Phoenix Assurance Co. v. Lucker*, 77 Fed. 243, 23 C. C. A. 139.

⁵*New England, etc. Co. v. Catholicon Co.* 79 Fed. 294, 24 C. C. A. 595; *Waples-Platter Co. v. Turner*, 83 Fed. 64, 27 C. C. A. 439; *Thiede v. Utah*, 159 U. S. 520, 40 L. ed. 243, 16 Sup. Ct. Rep. 66; *Linehan, etc. Transfer Co. v. Morris*, 87 Fed. 127, 30 C. C. A. 595; *Hodge v. Chicago, etc. Ry.* 121 Fed. 48, 57 C. C. A. 388.

⁷*Price v. Parkhurst*, 53 Fed. 313, 3 C. C. A. 551.

⁸*Thom v. Pittard*, 62 Fed. 235, 10 C. C. A. 352; *Block v. Darling*, 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. Rep. 832. See also *Van Gunden v. Coal, etc. Co.* 52 Fed. 838, 3 C. C. A. 294.

if it is proper to do so.¹⁰ This fact must appear on the record,¹¹ and where it does not appear the court will refuse to review assignments of error,¹² although the omission to take exceptions was in conformity with the practice of the trial court,¹³ or in conformity with a rule thereof.¹⁴

§ 1934. Taking of appeal in admiralty.

Appeal is the proper mode of procuring review in admiralty. Under R. S. § 1012 appeals are governed by the same general rules and regulations as writs of error.¹⁶ Since the act of 1891, admiralty cases are appealable to the circuit court of appeals,¹⁷ and in some circuits special rules governing the practice are in force, and should be consulted by the practitioner.^[a-e]

Author's section.

[a] Rules in second circuit.

In the second circuit, which includes the southern district of New York, where the great bulk of admiralty causes arise, admiralty rules were adopted by the circuit court of appeals May 20, 1892, and amended Oct. 5, 1892. Some of them respecting the record and apostles on appeal are given in a subsequent chapter.¹⁸ The first rule provides that "An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court and serving on the proctor of the adverse party, a notice, signed by the appellant or his proctor, that the party appeals to the circuit court of appeals from the decree complained of. The appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order."

It is further provided by the third admiralty rule in the second circuit that "The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions."

[b] — what general rules deemed admiralty rules.

"The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; section 4 of rule

¹⁰Price v. Parkhurst, 53 Fed. 313, 3 C. C. A. 551.

¹¹Phelps v. Mayer, 15 How. 161, 14 L. ed. 643.

¹²New England, etc. Co. v. Catholicon Co. 79 Fed. 296, 24 C. C. A. 595; Stone v. United States, 64 Fed. 667, 12 C. C. A. 451; Merchants' Exchange Bank v. McGraw, 76 Fed. 936, 22 C. C. A. 622.

¹³Little Rock, etc. Co. v. Dallas County, 66 Fed. 523, 13 C. C. A. 620; Johnson v. Garber, 73 Fed. 525, 19 C. C. A. 556.

¹⁴Western Union Co. v. Baker, 85 Fed. 691, 29 C. C. A. 392.

¹⁶Ante, § 1919

¹⁷Ante, § 77.

¹⁸Post, §§ 1962, et seq.

14; rules 15, 16, 17, 18, 19, 20, 21, 22; amended rule 23; section 5 of rule 24; rules 25, 26, 27, 28, 29; section 4 of rule 30; rules 31, 32, 34 and 36."¹⁹

[c] — when rules of district courts to apply.

"In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time, not being inconsistent with these rules, will be adopted so far as may seem proper."²⁰

[d] — extension of time.

"The time specified in the foregoing rules [i. e. admiralty rules on appeal in second circuit] for any proceeding may be extended by order of a judge of this court."²¹

[e] Rules in the ninth circuit.

In the ninth circuit admiralty rules were adopted by the circuit court of appeals of that circuit on May 21, 1900, to go into effect on the first Monday of the following October. Some of them respecting the record and apostles on appeal and respecting the appeal bond are given in following sections.² The first rule is identical with the first rule in the second circuit, as set forth above.³ The effect of this rule has been stated by the court as follows: "The rule so far modifies rule 11 of the General Rules, 31 C. C. A. CXLVI. 90 Fed. CXLVI, that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in rule 4 of the admiralty rules."⁴

Rule three of the ninth circuit is identical with rule three of the second circuit as above set forth,⁵ and rule twelve with rule seventeen.⁶

§ 1935. Amendments in prize appeals.

The Supreme Court may, if in its judgment the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes.

R. S. § 1006, U. S. Comp. Stat. 1901, p. 714.

The above section was originally enacted in 1873.⁸ A similar provision is contained in R. S. § 4636.⁹ Prize causes are appealable direct from the district to the supreme court.¹⁰

¹⁹Admiralty Rule XIX. in 2nd circuit.

²⁰Admiralty Rule XVIII. 2nd circuit.

¹Admiralty Rule XVII. 2nd circuit.

²Post, §§ 1962 et seq. 2027.

³Supra, note.[a]

⁴121 Fed. III.

⁵Supra note.[a]

⁶Supra, note.[d]

⁸Act Mar 3, 1873, c. 230, § 2, 17

Stat. 556.

⁹U. S. Comp. Stat. 1901, p. 3135.

¹⁰Ante § 42.

§ 1936. Writ of error in capital cases as of right without security.

Every such writ of error [i. e. to the Supreme Court on conviction of a capital crime in any court of the United States] shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs.

Part of § 6, act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 569.

Other portions of this provision are contained in other code sections.¹²

§ 1937. Order allowing appeal from Court of Claims.

In all cases on order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

Third supreme court rule in reference to appeals from Court of Claims, promulgated Dec. term, 1865.¹⁴

Where the party attempting to appeal signifies his intention within ninety days allowed by the statute for taking appeal,¹⁵ the limitation of time ceases to affect the case.¹⁶ The allowance of an appeal by the Court of Claims however, does not absolutely and of itself remove the cause from the courts jurisdiction and an order revoking the allowance may be made.¹⁷ Where an appeal has been allowed and the record filed in the supreme court the Court of Claims cannot set aside the allowance.¹⁸

§ 1938. Findings to be filed by Court of Claims.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

Fourth Supreme Court rule in reference to appeals from the Court of Claims, promulgated Dec. term, 1869.²⁰

§ 1939. — parties to request findings.

In every case, each party at such time before trial and in such form as the court may prescribe, shall submit to it a request to

¹²Ante, § 1904, post, § 2122

¹⁴3 Wall. viii.

¹⁵Ante, § 1897.

¹⁶United States v. Adams, 6 Wall. 108, 18 L. ed. 792.

¹⁷Ex parte Roberts, 15 Wall. 384, 27 L. ed. 131. But see United States v. Adams, 6 Wall. 108, 18 L. ed. 792.

¹⁸Kirks Case, 28 Ct. Cl. 276.

²⁰9 Wall. vii.

find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

Fifth supreme court rule in reference to appeals from Court of Claims, as amended Jan. 29, 1879.¹ The original rule was promulgated Dec. term, 1869.²

If the court of claims refuse to find a material fact the proper remedy is to take an exception which will then be reviewed on appeal.³ And if the finding is material the case will be sent back with directions to find such facts.⁴ But failure of the court to find a fact as party alleges it to be, does not justify bringing all evidence on that subject before the Supreme Court.⁵ The appellate court will not direct the lower court what to find or how to find it.⁶ The ultimate finding of the Court of Claims is held to be conclusive.⁷

§ 1940. Statement or findings by Territorial courts.

On appeal from the Territories the review is based upon a statement of the facts of the case in the nature of a special verdict, which the court from which the appeal is taken, is required to make, and upon rulings on the admission or rejection of evidence when excepted to and transmitted with the transcript.⁹

Author's section.

This is well settled.¹⁰ The matter of findings by Territorial courts is considered elsewhere.⁹

§ 1941. Extensions of time on admiralty appeals in 2nd and 9th circuits.

The time specified in the foregoing Rules [i. e. the admiralty rules in the second and ninth circuits¹¹] for any proceeding may be extended by order of a judge of this court.

Rule 17 in second circuit and rule 12 in ninth circuit.

¹⁹⁷ U. S. VIII.

²⁹ Wall. VII.

³United States v. Adams, 9 Wall. 661, 19 L. ed. 808; Lawrence v. United States, 8 Ct. Cl. 252.

⁴Mahan v. United States, 14 Wall. 109, 20 L. ed. 764.

⁵Mahan v. United States, 14 Wall. 112, 20 L. ed. 764.

⁶United States v. Adams, 9 Wall. 661, 19 L. ed. 808.

⁷Collier v. United States, 173 U. S. 80, 43 L. ed. 621, 19 Sup. Ct. Rep. 330.

⁹See post, § 1961.

¹⁰National, etc. Bk. v. First Nat. Bk. 203 U. S. —, 51 L. ed. —, (adv. op. p. 79.)

¹¹See appendix.

CHAPTER 59.

PERFECTING APPEAL—RECORD AND DOCKETING.

- § 1950. Return day and service of citation on appeal or error to Supreme Court.
- § 1951. —longer time on appeal from certain Western states, Hawaii, Porto Rico and the Philippines.
- § 1952. Return day and service on appeal or error to circuit court of appeals.
- § 1953. What papers must be returned with writ of error.
- § 1954. Record, assignments and all proceedings to be transmitted.
- § 1955. —rule in circuit courts of appeal.
- § 1956. General rules as to preparation of transcripts in equity, admiralty and at law.
- § 1957. Transmission and docketing in capital cases.
- § 1958. Final record in equity and admiralty causes.
- § 1959. What to be transmitted on appeal in equity and admiralty.
- § 1960. Records on appeal from court of claims.
- § 1961. What to be transmitted to Supreme Court from Territorial courts.
- § 1962. —from circuit court of appeals when question certified up.
- § 1963. Record in admiralty on appeal to circuit court of appeals.
- § 1964. —rule of second and ninth circuits as to apostles on appeal.
- § 1965. —other papers omitted unless specially ordered.
- § 1966. —apostles restricted on special appeals.
- § 1967. —filing and certification thereof.
- § 1968. —mandamus to compel return of apostles.
- § 1969. Opinions to be annexed to record.
- § 1970. Original papers received in Supreme Court on appeal.
- § 1971. —rule in circuit court of appeals.
- § 1972. General instructions as to docketing and printing record.
- § 1973. Docketing in supreme court—dismissal for failure.
- § 1974. —rule in circuit court of appeals.
- § 1975. Right of opposite party to docket and file record in supreme court.
- § 1976. —rule in circuit court of appeals.
- § 1977. Docketing admiralty cases in second circuit.
- § 1978. Appearance of counsel entered when transcript filed.
- § 1979. Undertaking for clerk's fees upon docketing and filing record.
- § 1980. —rule in circuit court of appeals.
- § 1981. Attachment to compel payment of supreme court clerk's fees.
- § 1982. —rule in circuit court of appeals.

- § 1983. —fees to be paid before record transmitted to supreme court.
- § 1984. Form and size of printed records in supreme court.
- § 1985. —in circuit courts of appeal.
- § 1986. Printing record in Supreme Court—costs, payment and dismissal for want thereof.
- § 1987. —number of copies to be printed.
- § 1988. —transcript to printer—copies of original papers.
- § 1989. —clerk to supervise printing and distribution.
- § 1990. —surplus and deficiency of cost to be paid or refunded.
- § 1991. —statement of errors and portions of record relied on, and printing same—penalty for omitting.
- § 1992. —foregoing rules apply to appeals direct from circuit and district courts.
- § 1993. Copies of records, briefs, etc. to be preserved by clerk in circuit courts of appeals.
- § 1994. Printing of record in circuit courts of appeal, various provisions.
- § 1995. Translations, how supplied.
- § 1996. Printing new appeals and testimony in admiralty appeals in second and ninth circuits.
- § 1997. Certiorari for diminution of record.
- § 1998. One record sufficient where both parties appeal.

§ 1950. Return day and service of citation on appeal or error to Supreme Court.

All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citations, whether the return day fall in vacation or in term-time, and be served before the return day.

Fifth paragraph of Supreme Court rule 8, as amended Oct. term, 1890,¹

Under the above rule the writ should be returned not exceeding thirty days from the signing of the citation. It is held however, that the return of a writ, one day after it was made returnable is not grounds for dismissal.² The procedure respecting the issuance and service of the citation is discussed in previous sections.³ A writ of error may be served by lodging a copy thereof for the adverse party, with the clerk of the court to which it is directed.⁴ This must be done in order that the writ operate as a supersedeas.⁵ Service may, however, be effected by personally serving the writ on the adverse party as is ordinarily the case in the service of any process,⁶ and it is sometimes effected by an acceptance or

¹137 U. S. 710.

ed. 588; Davidson v. Lanier, 4 Wall.

²Altenberg v. Grant, 83 Fed. 981, 447, 18 L. ed. 377.

28 C. C. A. 244.

⁵Post, § 2012.

³See ante, § 1913, et seq.

⁶McCarley v. McGhee, 108 Fed. 497.

⁴Wood v. Lide, 4 Cranch, 181, 2 L.

acknowledgment of service by the counsel for the defendant in error.⁷ The writ must be served before it is returned.⁸

§ 1951. — longer time on appeal from certain western States, Hawaii, Porto Rico and the Philippines.

In all cases where the period of thirty days is mentioned in rule 8 it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, and to one hundred and twenty days from the Philippine Islands.

4th paragraph Rule 9, as amended Jan. 29, 1906.¹⁰

Since the only case where the period of thirty days is mentioned in Rule 8 of the Supreme Court is in paragraph 5 of that rule, providing for the time of the return of appeals, writs of error and citations, it follows that the only effect of the above section is to enlarge the time for the return of writs of error and appeals from courts in the States above mentioned, to the Supreme Court. The failure to comply with the above rule, however, is not fatal to the appeal and hence the fact that a citation was made returnable more than sixty days from its issuance is no ground for dismissal.¹¹

§ 1952. Return day and service on appeal or error to circuit court of appeals.

The rule of different circuit courts of appeals as to return day and service of citations^[a] is exactly the same as paragraph 5 of the 8th Supreme Court rule,¹² except in the fifth,^[a] seventh,^[b] eighth^[c] and ninth^[d] circuits. In the eighth the return day is sixty days from the issuance of the writ. The exact provisions in these four circuits are given in the note.

Author's section.

[a] Rule in circuit court of appeals for fifth circuit.

"All appeals, writs of error and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day. Provided, however, that appeals taken from interlocutory decrees under the

⁷McCarley v. McGhee, 108 Fed. ed. 588; City of Washington v. Denison, 6 Wall. 496, 18 L. ed. 863.
⁸First Nat. Bank, 79 Fed. 296, 24 C. 10200 U. S. 626.

C. C. A. 597.

¹¹Shute v. Keyser, 149 U. S. 650,

¹²Wood v. Lide, 4 Cranch, 181, 2 L. 37 L. ed. 884, 13 Sup. Ct. Rep. 960.

¹³Ante, § 1950.

seventh section of the act entitled, "An act to establish circuit courts of appeal, and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, as said seventh section is amended by act approved February 18, 1895, shall be made returnable not exceeding ten days from the day of taking the same." Paragraph 5 of rule 14 of circuit court of appeals for fifth circuit as amended Jan. 12, 1905.

[b] Rule in seventh circuit.

"All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, the writ of error issued, or the citation signed, whether the return day fall in vacation or in term time, and be served before the return day." Paragraph 5, rule 14 of circuit court of appeals for seventh circuit, as amended March 29, 1894. There is no rule in the seventh circuit requiring the citation to be returnable to or before the next ensuing term of the circuit court of appeals.¹⁴

[c] Rule in eighth circuit.

"All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day." 5th Paragraph of rule 14 of circuit court of appeals for eighth circuit. Where the citation is made returnable sixty days after its date, and the writ of error on a day named which is less than sixty days therefrom, it will be presumed that the fixing of the latter day was an oversight and the appeal will not be dismissed where the record was filed thereafter, but within sixty days although the rules require that the record be filed "by or before the return day."¹⁵

[d] Rule in ninth circuit.

"All appeals, writs of error, and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day." Paragraph 5 of circuit court of appeals for the ninth circuit as amended Oct. 20, 1899.

[e] Rule as to return of appeals, writs of error, and citations merely directory.

The time for return of writs of errors and citations above prescribed is directory and not jurisdictional. Hence an appeal will not be dismissed for noncompliance, where the appellee has appeared and no injury has resulted

¹⁴Farmers etc. Co. v. Chicago etc. R. Co. 73 Fed. 314, 19 C. C. A. 477. ¹⁵McClellan v. Pyeatt, 49 Fed. 259; 1 C. C. A. 241, post, § 1974 (Rule 16).

from failure to comply with rule.¹⁷ Ordinarily, however, this rule and rule 16 as to filing of record,¹⁸ should be strictly observed.¹⁹

§ 1953. What papers must be returned with writ of error.

There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record,^[a] an assignment of errors,^[b] and a prayer for reversal,^[c] with a citation to the adverse party.^[d]

R. S. § 997, U. S. Comp. Stat. 1901, p. 712.

[a] Writ of error to be returned with transcript of record.

The original writ of error should be returned to the appellate court attached to the transcript.¹ But failure to attach the writ is not a fatal defect and the attachment may be made in the appellate court.² The destruction of the original writ will excuse its return, if a copy thereof be annexed to the record, with affidavit showing the destruction.³ So also where by mistake a copy of the writ was annexed to the transcript instead of the original, on production of the original with the citation, and acknowledgment of service thereon both certified by the clerk, they may be made or recognized as part of the record.⁴ A complete record should also be returned to the appellate court.⁵

[b] — assignment of errors.

The formal requisites of assignments of error, and the necessity for the filing of such assignments in the trial court are discussed in previous Code sections.⁶ Under the above provision the assignments must be returned to the appellate court with the transcript of record and writ. And when no such return is made and no counsel has appeared for the plaintiffs in error but the case is submitted on briefs without any specification of errors as required by Rule 21 of the Supreme Court,⁷ the judgment will be affirmed for want of due prosecution.⁸ A plain error may, however, be noticed by the appellate court although not assigned and annexed to the transcript as herein provided.⁹ But where there is no assignment or

¹⁷Love v. Busch, 142 Fed. 429, Rep. 642; Gregory v. Pike, 64 Fed. (C. C. A.).

¹⁸Post, § 1974.

¹⁹Chamberlain etc. Co. v. Coal Co. 126 Fed. 165, 61 C. C. A. 109.

¹Massina v. Cavazos, 6 Wall. 357, 18 L. ed. 810.

²Cotter v. Alabama etc. R. Co. 61 Fed. 747, 10 C. C. A. 35.

³Massina v. Cavazos, 6 Wall. 357, 18 L. ed. 810.

⁴Burnham v. Railway Co. 87 Fed. 168, 30 C. C. A. 594.

⁵Keene v. Whittaker, 13 Pet. 459, 10 L. ed. 246; Redfield v. Parks, 130 U. S. 623, 32 L. ed. 1053, 9 Sup. Ct.

⁶See ante, §§ 1920, 1821.

⁷See ante, § 1920.

⁸Dugger v. Tayloe, 121 U. S. 286, 27 L. ed. 946, 7 Sup. Ct. Rep. 895.

⁹U. S. v. Pena. 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165; School District v. Hall, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; Worlds etc., Exposition v. France, 91 Fed. 64, 33 C. C. A. 333. See ante, § 1931. [g].

specification or errors and no plain error, that the court may notice, the writ must be dismissed.¹⁰

[c] Prayer for reversal.

Omission of a prayer for reversal is so far a technical defect that the assignment of errors may be corrected by adding it.¹¹ A prayer in the petition for a writ of error that the writ may be issued "for the correction of errors so complained of," is a prayer for reversal within the meaning of the section.¹²

[d] Citation.

An early case held that the citation was not necessarily a part of the record,¹³ but it is now required by R. S. § 997, to be transmitted with it. The petition for allowance of the writ¹⁴ is no part of the record.¹⁴

§ 1954. Record, assignments and all proceedings to be transmitted.

The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record,^{[a]-[f]} and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.^[g]

Paragraph 1 of Supreme Court Rule 8, as revised Jan. 4, 1884.

[a] Contents of record in general.

No strict rule can be laid down as to what the record shall or shall not contain and the fifty-second admiralty rule¹⁵ has been suggested as a guide. The circuit court of appeals for the seventh circuit sanctions the practice of requiring the counsel for the appellant or plaintiff in error to file a praecipe stating what the record shall contain so that the clerk may know what to include therein.¹⁷ Irrelevant and useless matter which tends only to increase the cost of the suit should be eliminated and the case should be presented fairly and intelligently.¹⁸ Hence, the appellate court may refuse to consider it where the record is so confused as to be almost unintelligible.¹⁹ But the court is not inclined to be over technical in its

¹⁰Rowe v. Phelps, 152 U. S. 87, 38 L. ed. 365, 14 Sup. Ct. Rep. 632.

¹¹Springfield etc. Co. v. Attica, 85 Fed. 387, 29 C. C. A. 214; McClellan v. Pyeatt, 49 Fed. 259, 1 C. C. A. 241.

¹²Springfield etc. Co. v. Attica, 85 Fed. 387, 29 C. C. A. 214.

¹³Innerarity v. Byrne, 5 How. 295, 12 L. ed. 159; see Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511.

¹⁴Manning v. French, 133 U. S. 193, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; Leeper v. Texas, 139 U. S. 467, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

¹⁵Railway Co. v. Stewart, 95 U. S. 284, 24 L. ed. 433; see appendix.

¹⁷Burnham v. North Chicago etc. Ry. 87 Fed. 168, 30 C. C. A. 596.

¹⁸Burnham v. North Chicago etc. Ry. 87 Fed. 168, 30 C. C. A. 595; Railway Co. v. Stewart, 95 U. S. 284, 24 L. ed. 431; Ball v. Socket etc. Co. v. Kraetzer, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 48.

¹⁹See Clark v. Fredericks, 105 U. S. 5, 26 L. ed. 938.

construction²⁰ and will endeavor to determine the case on its merits without a consideration of immaterial points which have been submitted as error.¹ An incomplete record may be remedied by certiorari.²

[b] Must be complete—jurisdictional facts.

Since nothing can be considered on a writ of error except what appears on the record⁴ the record should be complete.⁵ Hence where a complaint and answers were filed in the lower court, they are necessary to a hearing on appeal and unless they are contained in the record the case cannot be heard.⁶ So also a record is insufficient which contains merely an agreed statement of facts and the judgment without setting forth the proceedings of the lower court.⁷ There being no presumption as to jurisdiction, jurisdictional facts must affirmatively appear on the record or the case will be dismissed.⁸

[c] What evidence included.

Evidence is not considered in the appellate court unless it is part of the record¹⁰ and whether written or oral, or whether given to the court or jury, it does not become part of the record unless made so by some regular proceeding at the term of the trial, usually by a bill of exceptions, agreed statement of facts, or a special finding in the nature of a special verdict.¹¹ In early practice matters of evidence might be made a part of the record so as to be re-examined by the appellate court, by a demurrer to evidence,¹² but this mode is now seldom or never adopted.¹³ Therefore evidence, such as affidavits or depositions, does not become a part of the record unless made so, even though it appears in the transcript;¹⁴

²⁰Dunlap v. Northeastern R. R. 130 U. S. 653, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647.

¹See Randow v. Toby, 11 How. 521, 13 L. ed. 784.

²See post, § 1997.

⁴Suydam v. Williamson, 20 How. 427, 15 L. ed. 978; Arthurs v. Hart, 17 How. 6, 15 L. ed. 30; Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Claasen v. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169.

⁵Gregory v. Pike, 64 Fed. 415, 12 C. A. 204; Redfield v. Parks, 130 U. S. 624, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642.

⁶Redfield v. Parks, 130 U. S. 625, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642.

⁷Keene v. Whittaker, 13 Pet. 459, 10 L. ed. 246; Curtis v. Petitpain, 18 How. 109, 15 L. ed. 280.

⁸Sullivan v. Fulton Steamboat Co. 6 Wheat. 451, 5 L. ed. 302; Keene v. Whittaker, 13 Pet. 459, 10 L. ed.

246; Ex parte Smith, 94 U. S. 455, 24 L. ed. 165; Huntington v. Saunders, 163 U. S. 321, 41 L. ed. 174, 16 Sup. Ct. Rep. 1120.

¹⁰Leland v. Wilkinson, 6 Pet. 319, 8 L. ed. 412; see also Hartog v. Memory, 116 U. S. 591, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

¹¹Suydam v. Williamson, 20 How. 433, 15 L. ed. 978; Baltimore etc. R. R. v. Trustees, 91 U. S. 130, 23 L. ed. 260; England v. Gebhardt, 112 U. S. 505, 28 L. ed. 812, 5 Sup. Ct. Rep. 287; Storm v. United States, 94 U. S. 81, 24 L. ed. 44.

¹²See ante, § 1918.

¹³Baltimore etc. R. R. v. Trustees, 91 U. S. 130, 23 L. ed. 261.

¹⁴Evans v. Stettinisch, 149 U. S. 605, 37 L. ed. 866, 13 Sup. Ct. Rep. 931; Stewart v. Wyoming etc. Co. 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101; Baltimore etc. R. R. v. Trustees, 91 U. S. 130, 23 L. ed. 261.

and the same is true of rulings of the court upon admission or rejection of evidence or instructions to the jury.¹⁵

[d]—opinion of trial court whether part of record.

It is held that the opinion of the trial court constitutes no part of the record in the appellate court,¹⁶ although required by a court rule to be annexed to and transmitted with it.¹⁷ On error to State courts if by the State practice, the opinion of the State justice is required to be filed and spread upon the record, such opinion is examinable by the Supreme Court in order to ascertain the question decided.¹⁸ A certificate of a judge of the State court that a Federal question was presented while entitled to great respect if intended to make more certain and specific what is too general in the record,¹⁹ is not properly a part of the record and is insufficient in itself to give the appellate court jurisdiction.²⁰ On error to a lower Federal court the opinion below has been deemed part of the record where the question in dispute was not whether the trial court erred in its decision, but whether a certain matter was or was not decided.¹ But the appellate court cannot refer to the opinion of the court below for the purpose of eking out controlling or modifying the scope of the findings of that court.²

[e]—papers on file as part of record—clerk's certificate.

The fact that a paper is found among the files of a cause does not of itself constitute it a part of the record. If not a part of the pleadings or process, it must be made a part of the record by bill of exceptions or its equivalent.³ Hence, a paper giving all the evidence as it was introduced,

¹⁵*Storm v. United States*, 94 U. S. 81, 24 L. ed. 45.

¹⁶*England v. Gebhardt*, 112 U. S. 506, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; *City of Mobile v. Eslava*, 16 Pet. 246, 10 L. ed. 948.

¹⁷See post, § 1969.

¹⁸*Adams Co. v. Burlington R. R.* 112 U. S. 129, 28 L. ed. 680, 5 Sup. Ct. Rep. 80; *Gross v. United States Mortgage Co.* 108 U. S. 486, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Philadelphia etc. Ass'n. v. New York*, 119 U. S. 116, 30 L. ed. 346, 7 Sup. Ct. Rep. 111; *Kreiger, v. Shelby R. R.* 125 U. S. 44, 31 L. ed. 678, 8 Sup. Ct. Rep. 755; *Egan v. Hart*, 165 U. S. 190, 41 L. ed. 681, 17 Sup. Ct. Rep. 301; *Thompson v. Maxwell etc. Co.* 168 U. S. 456, 42 L. ed. 541, 18 Sup. Ct. Rep. 123; *Castillo v. McConico*, 168 U. S. 677, 42 L. ed. 624, 18 Sup. Ct. Rep. 231; *Land & Water Co. v. San Jose etc. Co.* 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 489.

¹⁹*Parmelee v. Lawrence*, 11 Wall.

39, 20 L. ed. 49; *Brown v. Atwell*, 92 U. S. 330, 23 L. ed. 513.

²⁰*Home for Incurables v. New York*, 187 U. S. 158, 47 L. ed. 119, 23 Sup. Ct. Rep. 84; *Powell v. Brunswick Co.* 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; *Newport Light Co. v. Newport*, 151 U. S. 537, 38 L. ed. 263, 14 Sup. Ct. Rep. 429; *Yazoo etc. R. R. v. Adams*, 180 U. S. 47, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; *Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 689, 8 Sup. Ct. Rep. 759.

¹*United States v. St. Anthony R. Co.* 114 Fed. 722, 52 C. C. A. 534.

²*Stone v. United States*, 164 U. S. 380, 17 Sup. Ct. Rep. 71, 41 L. ed. 477.

³*Sargeant v. State Bank*, 12 How. 385, 13 L. ed. 1034; *Rio Grande etc. Co. v. Gildersleeve*, 174 U. S. 608, 43 L. ed. 1106, 19 Sup. Ct. Rep. 761; *England v. Gebhardt*, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287; *Russell v. Ely*, 2 Black, 581, 17 L. ed. 258.

which is not a bill of exceptions, an agreed statement of facts, or a special verdict or finding of facts, is not a part of the record and must be disregarded;⁴ and the fact that it was certified to by the clerk is immaterial.⁵

While certificates of the clerk below are inadmissible to impeach the record⁶ yet such a certificate, subsequent to his usual return to the writ, will serve to make an additional order a part of the record.⁷ The original petition where one is made, is properly a part thereof.⁸

[f] — bill of exceptions or its equivalent.

The essentials of a bill of exceptions have been discussed in a previous section.¹⁰ While unknown in equity,¹¹ a bill of exceptions or its equivalent is necessary upon a writ of error, in order to bring before the appellate court, the facts of the case,¹² the rulings of the lower court in admitting or rejecting evidence and the instructions given or refused.¹³ Where there is no dispute in regard to the facts and hence no necessity for any ruling of the court in admitting or rejecting evidence, the purpose of a bill of exceptions may be accomplished by an agreed statement of facts, put upon the record, and the questions of law arising thereon may be re-examined by the appellate court.¹⁴ So also where the facts of the case have been found by special verdict the decision of the trial court in favor of the plaintiff or defendant under the facts so found may be reviewed on appeal, and the sufficiency of the special verdict examined.¹⁵ But the bill of exceptions is undoubtedly the safest and most comprehensive method; and where the facts are disputed and cannot be arranged except from evidence admitted under the ruling of the court as to its admissibility, it often times becomes the only effectual mode by which all the rights of the complaining party may be preserved.¹⁶

A statement of facts signed by both parties after suing out a writ of error is no part of the record, and cannot take the place of the bill of exceptions.¹⁸ So also a statement that the defendant excepted to the courts

⁴*Pomeroy v. State Bank*, 1 Wall. 592, 17 L. ed. 638; *Redfield v. Ystalyfera Iron Co.* 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; *National Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 554.

⁵*Fisher v. Cockerell*, 5 Pet. 254, 8 L. ed. 114; see also *Duncan v. Atchison*, etc. R. Co. 72 Fed. 812, 19 C. C. A. 202.

⁶*Hudgins v. Kemp*, 18 How. 530, 15 L. ed. 511.

⁷*Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745.

⁸*Mexican, etc. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

¹⁰See ante, § 1922.

¹¹*Ex parte Story*, 12 Pet. 339, 9 L. ed. 1108.

¹²*Kearney v. Case*, 12 Wall. 280, 20 L. ed. 395.

¹³*Suydam v. Williamson*, 20 How. 435, 15 L. ed. 982; see *Worthington v. Mason*, 101 U. S. 152, 25 L. ed. 848.

¹⁴*Stimpson v. Baltimore etc. R. R.* 10 How. 347, 13 L. ed. 449; *U. S. Eliason*, 16 Pet. 291, 10 L. ed. 970; *Suydam v. Williamson*, 20 How. 434, 15 L. ed. 981; see *Norris v. Jackson*, 9 Wall. 128, 19 L. ed. 609.

¹⁵*Suydam v. Williamson*, 20 How. 434, 15 L. ed. 981; *Norris v. Jackson*, 9 Wall. 128, 19 L. ed. 609.

¹⁶*Suydam v. Williamson*, 20 How. 434, 15 L. ed. 981.

¹⁸*Kearney v. Case*, 12 Wall. 280, 20 L. ed. 395.

charge if not included in the bill of exceptions, will not be considered.¹⁹ All matters and facts stated in an authenticated bill of exceptions are considered as brought into the record for a proper purpose.²⁰

[g] — authentication of record.

The record is authenticated by annexing a transcript of the original record to the writ of error and returning it under the seal of the court certified by the clerk.¹ A certification that the transcript sent up "is a true, full and perfect copy from the record of all the proceedings in the suit" is sufficient.² There is no need that the copy be signed by the judge it being sufficient if signed by the clerk,³ or his deputy.⁴ Where the clerk fails to sign, on a motion to dismiss for such failure which is made after it is too late to take a new appeal or writ of error, the court may allow the certificate of authentication to be perfected by adding the signature.⁵ A blank form of certificate to the transcript filed without seal or signature of the clerk is insufficient⁶ where the transcript is properly sent to the circuit court of appeals by the clerk of the lower court the fact that he certifies on the writ, that he "herewith transmits to the Supreme Court of the United States a duly certified transcript" is an immaterial mistake.⁷ Since the appellate court obtains jurisdiction on the filing of the writ of error in the lower court a defect in the authentication of the transcript cannot defeat jurisdiction.⁸ The transcript imports absolute verity and cannot be contradicted by outside evidence.⁹

§ 1955. — rule in circuit courts of appeal.

In all save the third and ninth circuits the rule is as follows: "The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court."¹¹ The rule in the third circuit requires that the clerk's fee shall first be paid

¹⁹Struthers v. Drexel, 122 U. S. 8 L. ed. 483; see Webster v. Reid, 11 491, 30 L. ed. 1216, 7 Sup. St. Rep. How. 437, 13 L. ed. 761.
^{1293.}

²⁰Lees v. United States, 150 U. S. L. ed. 536.
482, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

¹Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; see Garneau v. Dozier, 100 U. S. 7, 25 L. ed. 536.

²Missouri, etc. Railroad Co. v. Dinsmore, 108 U. S. 31, 27 L. ed. 640, 2 Sup. Ct. Rep. 9; see Pennsylvania, etc. Co. v. Jacksonville etc. Ry. 55 Fed. 131, 5 C. C. A. 53; Jacksonville etc. Ry. Co. v. American etc. Co. 57 Fed. 66, 6 C. C. A. 253.

³Worcester v. Georgia, 6 Pet. 515, Fed. clv.

⁴Paragraph 1 of Rule 14, see 90 Fed. Proc.—98.

or tendered.^[a] In the ninth circuit the opinion or opinions below must be transmitted.^[b]

Author's section.

[a]—in third circuit.

The clerk of the court to which any writ of error may be directed, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.¹²

[b]—in ninth circuit.

The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.¹³

§ 1956. General rules as to preparation of transcripts in equity, admiralty and at law.

The instructions issued by the clerk of the circuit court of appeals in the fourth circuit, already quoted from,¹⁵ are of general value as to the preparation of the transcript, and what it should contain.^{[a]-[b]}

Author's section.

[a] Instructions in fourth circuit.

In making up a transcript of the record clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon but one side of the paper, in a clear, legible hand; and a complete index should be made and attached to the record, at the beginning of it. In order to have uniformity, record should be commenced with the style and the term of the court at which the judgment or decree is entered, after the following form:

The United States of America, _____.

District of _____, to wit:

At a circuit (or district) court of the United States for the _____ district of _____, begun and held at the court house in the city of _____ on the first Monday of _____, being the _____ day of the same month, in the year of our Lord one thousand nine hundred and _____.

Present: The Honorable _____,
Circuit Judge.

or

¹²Par. 1 of Rule 14, see 90 Fed. clv.

¹⁵Ante, § 1913.

¹³Par. 1 of Rule 14, see 90 Fed. clv.

Judge of the _____ District of _____.

Among other were the following proceedings, to wit:

A. B. } In Equity (or)
 } In Admiralty (or)
 vs. }
 C. D. } At Law.

Bill of complaint (or)

Libel (or)

Declaration (or Complaint)

Filed, _____190— (date of filing)

(Copy same, with indorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.) Every paper or proceeding should have a distinct heading or title of what it is that follows under it, and the date of the filing of the paper or of the proceeding. A complete record, as required by rule 14, must be made in all cases, (for record in admiralty cases, see section 6 or that rule;) but as to the general order of making up a record, the following examples are given:

In equity.	In admiralty.	At law.
1. Style of court as above.	1. Style of court.	1. Style of court.
2. Bill of complaint, etc.	2. Libel.	2. Declaration.
3. Process.	3. Process.	3. Process.
4. Marshal's return.	4. Marshal's return.	4. Marshal's return.
5. Answer.	5. Claim.	5. Plea or demurrer, etc.
6. Replication.	6. Stipulation.	6. Joining of issue.
7. Testimony and exhibits for complainant.	7. Answer.	7. Impanelling jury.
8. Testimony and exhibits for defendant.	8. Testimony and exhibits for libellant.	8. Verdict.
9. Testimony and exhibits in rebuttal (if any).	9. Testimony and exhibits for respondent.	9. Judgment.
10. Opinion.	10. Testimony and exhibits in rebuttal (if any).	[In ninth circuit the opinion.]
11. Decree.	11. Opinion.	10. Bill of exceptions.
12. Petition for appeal.	12. Decree.	11. Petition for writ of error.
13. Assignment of errors.	13. Petition for appeal.	12. Assignment of errors.
14. Appeal bond and approval.	14. Assignment of errors.	13. Bond and approval.
15. Order allowing appeal.	15. Appeal bond and approval.	14. Order allowing writ.
16. Citation.	16. Order allowing appeal.	15. Writ of error.
17. Clerk's certificate.	17. Citation.	16. Citation.
	18. Clerk's certificate.	17. Clerk's certificate.

The numerical order of the above list of proceedings may be transposed whenever the order of proceeding is different. Of course, it is impossible to give information and directions to cover the details of every case, for there are not two cases alike; but the above does cover the substantial parts of every case. While a full record is necessary, yet it is expected that counsel on both sides will exercise care that no matter not necessary to a full and complete review of the case shall be put into the record. Whenever any argument shall be entered into by counsel with regard to the making up or the printing of the record under rule 23, the agreement must be copied into the record. All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the Fourth circuit; and the same is transmitted accordingly.

"Teste; _____ Clerk."

Then comes the general certificate of the clerk, in the usual form, that the foregoing is a true and full record, etc., with the seal of the court attached.

[b] Rule in seventh circuit as to duplications in record.

The tenth rule of the circuit court of appeals for the seventh circuit provides that, "No document shall be copied more than once . . . in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript unless required by written precept, of which a copy shall also be set out."¹⁶

§ 1957. Transmission and docketing in capital cases.

Upon the allowance of every such writ of error [i. e., to the Supreme Court on conviction of capital crime in any court of the United States], it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file and docket the same. . . . Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named;

¹⁶Clause 3, Rule 10, C. C. A. 7th circuit. For other parts of 10th rule see ante, §§ 1933, 1934. See also appendix, I. E.

and all such writs of error shall be advanced to a speedy hearing on motion of either party.

Part of § 6, art Fed. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 569, 570.

§ 1958. Final record in equity and admiralty causes.

In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.

R. S. § 750, U. S. Comp. Stat. 1901, p. 591.

This section was carried into the Revised Statutes from an act of 1853.¹⁸ There are some suggestions as to the record on appeal, in note to a former section.¹⁹ The final record provided for by this section is intended to answer the purpose of the enrollment of the decree under the former chancery practice. Hence, the section should be construed with due regard to such former practice, and where, under that practice no enrollment was necessary if there was no adjudication between the parties, no final record is now necessary in such a case.²⁰ The record here referred to is the technical record on appeal and the section does not prohibit other papers and documents being sent to the appellate court.¹ It corresponds to the judgment record at common law.²

§ 1959. What to be transmitted on appeal in equity and admiralty.

Upon the appeal of any cause in equity or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made^[a] and copies of the proofs and of such entries and papers on file^[b] as may be necessary on the hearing of the appeal^[c] shall be transmitted to the Supreme Court: Provided, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.

Part of R. S. § 698, U. S. Comp. Stat. 1901, p. 568.

[a] Transcript on appeal—record what to contain.

The provisions of the above section apply as well to appeals to the cir-

¹⁸Act Feb. 26, 1853, C. 80, § 1, 10 Stat. 163.

¹⁹Ante, § 1956 [a]

²⁰Consolidated etc. Co. v. Detten-
thaler, 93 Fed. 307.

¹See Southern etc. Co. v. Carey,
117 Fed. 333.

²Blain v. Home Ins. Co. 30 Fed.

667.

circuit court of appeals as to the Supreme Court.⁴ In the above section the distinction is recognized between that which constitutes the final record⁵ and that which may be made part of the record for the purpose of appeal.⁶ Ordinarily, the whole of such final record must be filed, except that when there has been a previous appeal matters preceding the mandate should be omitted.⁷ So where there has been an original and a cross-bill both should be included in the record⁸ as they constitute but one suit.⁹

It is not necessary that the transcript on appeal contain all the proofs, entries papers and proceedings below.¹⁰ Thus, where there has been a prior appeal, it is necessary to insert only the matter which followed the mandate, and to include proofs taken in the main issues is not only unnecessary but improper.¹¹ So where upon the face of the decree it appears that the case was disposed of on a demurrer to the bill, the evidence on file is not necessary for the hearing of the appeal;¹² and, in general, useless and irrelevant papers should not encumber the record whether on appeal or on writ of error. Evidence in an admiralty case not made part of the bill of exceptions, will not be considered although included in the transcript.¹³ Some helpful suggestions as to the making up of the record are quoted under a preceding section.¹⁴

[b] — proofs, entries, etc.

Where witnesses are examined orally in court in an equity case, the testimony must be reduced to writing and made part of the record or it will be disregarded on appeal.¹⁵ Oral testimony in an equity case can, however, be taken before the court, only "upon due notice given as prescribed by previous order."¹⁷ Where the testimony is objected to and ruled out, it must still be sent up with the record subject to the exception, or the ruling will not be considered by the appellate court.¹⁸ In admiralty cases also, proofs intended for appeal should be reduced to writing¹⁹ and the circuit court of appeals, which now has appellate jurisdiction in such cases,

⁴See ante, § 1878, 1880; *The Philadelphia*, 60 Fed. 427, 9 C. C. A. 54.

⁵See ante, § 1958.

⁶In re Cooper, 143 U. S. 507, 36 L. ed. 244, 12 Sup. Ct. Rep. 453.

⁷*Nashua etc. R. Co. v. Boston, etc.* R. Co. 61 Fed. 243, 9 C. C. A. 468; *Supervisors v. Kennicott*, 94 U. S. 499, 24 L. ed. 260; *Union Pac. Ry. Co. v. United States* 116 U. S. 402, 29 L. ed. 677, 6 Sup. Ct. Rep. 631.

⁸*Gregory v. Pike*, 64 Fed. 415, 12 C. C. A. 204.

⁹*Ex parte Railroad Co.* 95 U. S. 225, 24 L. ed. 355; *Ayers v. Carver*, 17 How. 591, 15 L. ed. 179.

¹⁰*Nashua etc. R. Corp. v. Boston etc. R. Corp.* 61 Fed. 244, 9 C. C. A. 468.

¹¹*Nashua etc. R. Corp. v. Boston*

etc. R. Corp. 61 Fed. 242, 9 C. C. A. 468.

¹²*Missouri etc. Ry. v. Dinsmore*, 108 U. S. 31, 27 L. ed. 640, 2 Sup. Ct. Rep. 9.

¹³See *The Wyandotte*, 145 Fed. 321, (C. C. A.)

¹⁴Ante, § 1956.

¹⁵*Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 521; *Mears v. Lockhart*, 94 Fed. 275, 36 C. C. A. 239; see *The Philadelphia*, 60 Fed. 425, 9 C. C. A. 54; ante § 1054.

¹⁷*Mears v. Lockhart*, 94 Fed. 275, 36 C. C. A. 239.

¹⁸*Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 521; *Adee v. Mott Iron Works*, 46 Fed. 39.

¹⁹*The Philadelphia*, 60 Fed. 427, 9 C. C. A. 54; *The Boston*, 1 Sumn. 332, Fed. Cas. No. 1,673.

while without power to prescribe rules for the district court, such power being vested in the Supreme Court,²⁰ may refuse to consider proofs not reduced to writing in the district court, no equivalent proof being found in the record.¹

[c] Such papers, etc transmitted "as may be necessary."

It is the duty of the party taking an appeal, to see that it is properly presented in the appellate court.² What the record shall contain may be determined by a joint stipulation between the parties or by written instructions to the clerk;³ and it is the duty of the solicitors and attorneys to give such instructions in order to simplify the transcript.⁴ The clerk, however, being the certifying officer, may refuse to certify a transcript with such palpable and substantial omissions as, in his opinion, to justify his assuming the responsibility of refusal.⁵ He acts, however, as an officer and under the general direction of the lower court and hence when requested to insert a matter by one party, and to leave it out by another, the lower court may direct what shall be done.⁶

§ 1960. Record on appeal from Court of Claims.

In all cases hereafter decided in the Court of Claims, in which, by the act of Congress,⁸ such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

I. Transcript.—A transcript of the pleadings in the case of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

II. Statement of facts and conclusions of law.—A finding by the Court of Claims of the facts in the case established by the evidence of the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

1st Supreme Court rule in reference to appeals from the Court of Claims, as amended Dec Term 1872.⁹

²⁰Ante, § 802.

¹The Philadelphian, 60 Fed. 427,

9 C. C. A. 54.

²Railway Co. v. Stewart, 95 U. S. 284, 24 L. ed. 431.

³Nashua etc. R. Corp. v. Boston etc. R. Corp. 61 Fed. 245, 9 C. C. A. 468; see also Burnham v. North etc. Ry. 87 Fed. 168, 30 C. C. A. 594.

⁴Nashua etc. R. Corp. v. Boston

etc. R. Corp. 61 Fed. 245, 9 C. C. A. 468.

⁵Nashua etc. R. Corp. v. Boston etc. R. Corp. 61 Fed. 245, 9 C. C. A. 468.

⁶Hoe v. Kahler, 27 Fed. 146; see Southern etc. Assn. v. Carey, 117 Fed. 334.

⁸Ante, § 58.

⁹17 Wall. XVII.

The rule was originally promulgated Dec. Term 1865.¹⁰ The Court of Claims should not send up the evidence even though the parties agree thereto.¹¹ But if it is sent up and from it there appears no legal ground for the establishment of the facts found judgment will be reversed.¹² Where, however, the testimony is merely described in the record and not set forth, the finding of the Court of Claims is conclusive.¹³ The fact that the record is improperly prepared does not warrant a dismissal but the record will be remanded for correction.¹⁴ In an equity case the appellate court reviews all the facts and the law as in other cases in equity, appealed from other courts;¹⁵ and the whole record goes up.¹⁶

§ 1961. What to be transmitted to Supreme Court from Territorial courts.

On appeal [from Territorial courts to the Supreme Court] instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree.^{[a]-[e]}

Part of § 2, act April 7, 1874, c. 80, 18 Stat. 27.

Another portion of the above section is given in a previous chapter.¹⁸

[a] Form and necessity in general.

The above provision applies to appeals as distinguished from writs of error.¹ It is necessary that the statement here required accompany the transcript.² In the absence of both statement and bill of exceptions there is nothing for the Supreme Court to review.³ The findings of the district court in cases affirmed by the Territorial appellate court have often constituted the statement required by this section.⁴ But it will be noted that the statute requires a statement by the court from which the appeal is taken and

¹⁰3 Wall. VII.

¹¹Hubbell v. U. S. 6 Ct. Cl. 53.

¹²United States v. Clark, 96 U. S. 37, 24 L. ed. 696.

¹³Stone v. United States, 164 U. S. 383, 41 L. 478, 17 Sup. Ct. Rep. 71.

¹⁴United States v. Adams, 6 Wall. 101, 18 L. ed. 792; Wilcox v. United States, 6 Ct. Cl. 77; United States v. Clark, 94 U. S. 73, 24 L. ed. 67.

¹⁵United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650.

¹⁶La Abra Mining Co.'s Case, 32 Ct. Cl. 462.

¹⁸Ante, § 1894.

¹This is clear from the context; see Hecht v. Boughton, 105 U. S. 236, 26 L. ed. 1018.

²Davis v. Fredericks, 104 U. S. 619, 26 L. ed. 849; Gray v. Howe, 108 U. S. 13, 27 L. ed. 634, 1 Sup. Ct. Rep. 136.

³Salina S. Co. v. Salina Art Co. 163 U. S. 118, 41 L. ed. 90, 16 Sup. Ct. Rep. 1036.

⁴Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Cannon v. Pratt, 99 U. S. 622, 25 L. ed. 446; Neslin v. Wells, 104 U. S. 429, 26 L. ed. 802; Haws v. Victoria etc. Co. 160 U. S. 313, 40 L. ed. 436, 16 Sup. Ct. Rep.

not by some inferior court.⁵ Clearly therefore, it is the adoption of such findings by the appellate court of the Territory that makes them suffice. And if, after such adoption, it embody in the record other findings or statements which are really statements or findings of fact though termed by it conclusions of law, the Supreme Court may take them into consideration, even to the extent of ordering a reversal thereon in a proper case.⁶ If the Territorial appellate court reverses, it necessarily sets aside the findings below so that they cannot then constitute a statement under this section.⁷ The territorial court's opinion may constitute a sufficient statement if it sets forth the facts.⁸

[b] Conclusiveness of Territorial courts statement.

The statement prepared pursuant to this provision is deemed conclusive by the Supreme Court so far as the facts are concerned.⁹ The Supreme Court accepts it as correct,¹⁰ and refuses to look into the question of the weight or sufficiency of the evidence to sustain it.¹¹ The only question respecting the statement, is whether it supports or justifies the judgment rendered,¹² even though the evidence is embodied in the record.¹³ Preponderance of proof will not be investigated.¹⁴ It has often been more broadly held that the Supreme Court can only review questions of law in cases brought up from the Territories.¹⁵ Territorial statutes cannot broaden the scope of the review.¹⁶

[c] The bill of exceptions.

Aside from the question whether the findings or statement supports the judgment, the Supreme Court can only review exceptions duly taken to

282; *O'Reilly v. Campbell*, 116 U. S. 420, 29 L. ed. 669, 6 Sup. Ct. Rep. 421. It has been considered that on affirmance the higher Territorial court was obliged to adopt the findings below, a view which does not seem in harmony with *Apache Co. v. Barth*, *infra*.

⁵*Haws v. Victoria etc. Co.* 160 U. S. 313, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

⁶*Apache Co. v. Barth*, 177 U. S. 542, 44 L. ed. 879, 20 Sup. Ct. Rep. 718.

⁷*Gray v. Howe*, 108 U. S. 13, 27 L. ed. 634, 1 Sup. Ct. Rep. 136.

⁸*National L. S. Bk. v. First Nat. Bk.* 203 U. S. 296, 51 L. ed. (adv. op. p. 79).

⁹*Hecht v. Boughton*, 105 U. S. 236, 26 L. ed. 1018.

¹⁰*Eilers v. Boatman*, 111 U. S. 357, 28 L. ed. 454, 4 Sup. Ct. Rep. 432; *Ogden City v. Armstrong*, 168 U. S. 235, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

¹¹*Mammoth M. Co. v. Salt Lake*

M. Co. 151 U. S. 450, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; *Zackendorf v. Johnson*, 123 U. S. 618, 31 L. ed. 277, 8 Sup. Ct. Rep. 261; *Herrick v. Boquillas*, 200 U. S. 96, 50 L. ed. 388, 26 Sup. Ct. Rep. 192; *Holloway v. Dunham*, 170 U. S. 617, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784.

¹²*Idaho etc. Co. v. Bradbury*, 132 U. S. 514, 515, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Harrison v. Perea*, 168 U. S. 323, 42 L. ed. 482, 18 Sup. Ct. Rep. 129; *Apache Co. v. Barth*, 177 U. S. 542, 44 L. ed. 879, 20 Sup. Ct. Rep. 718.

¹³*San Pedro etc. Co. v. United States*, 146 U. S. 130, 131, 138, 36 L. ed. 911, 13 Sup. Ct. Rep. 94.

¹⁴*Haws v. Victoria M. Co.* 160 U. S. 313, 40 L. ed. 436, 16 Sup. Ct. Rep. 282.

¹⁵*Idaho, etc. L. Co. v. Bradbury*, 132 U. S. 513, 514, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Sturr v. Beck*, 133 U. S. 546, 33 L. ed. 761.

¹⁶*Grayson v. Lynch*, 163 U. S. 473, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064.

rulings on the admission or rejection of evidence.¹⁸ In the absence of bill of exceptions in the record the only question is the sufficiency of the findings or statements.¹⁹

§ 1962. — from circuit court of appeals when question certified up.

Where under section 6 of the said act [i. e., act of 1891¹] a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises. If application is thereupon made to this court that the whole record and cause [i. e., from the circuit court of appeals] may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record. Where application is made to this court under section 6 of the said act [i. e., act of 1891] to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

Supreme Court rule 37, promulgated May 11, 1891.²

Upon certifying cases to the Supreme Court it is the fundamental facts that are to be stated and not the evidential facts from which such fundamental facts are found.³

It is provided by the act of March 3, 1891, that the Supreme Court may either instruct on questions certified to it by the circuit court of appeals or require that the whole record be sent up for its consideration.⁵

¹⁸Haws v. Victoria C. M. Co. 160 Sup. Ct. Rep. 663. The Blue Jacket, U. S. 313, 40 L. ed. 436, 16 Sup. Ct. 144 U. S. 387, 388, 36 L. ed. 476, 12 Rep. 282; Grayson v. Lynch, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 711; Apache Co. v. Barth, 177 U. S. 542, 44 L. ed. 879, 1064; Young v. Amy, 171 U. S. 179, 20 Sup. Ct. Rep. 718.
¹⁸³, 43 L. ed. 127, 128, 18 Sup. Ct. Rep. 802; Apache Co. v. Barth, 177 U. S. 542, 44 L. ed. 879, 20 Sup. Ct. Rep. 718.

¹⁹Gildersleeve v. New Mexico M. Co. 161 U. S. 577, 40 L. ed. 812, 16

¹Ante, § 40.

²139 U. S. 706.

³Sigafus v. Porter, 85 Fed. 689, 29 C. C. A. 391.

⁵Ante, § 40.

§ 1963. Record in admiralty on appeal to circuit court of appeals.

In all except the first circuit^[c] the 6th paragraph of rule 14 of the circuit court of appeal provides that "the record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule number fifty-two of the Supreme Court."⁸

Author's section.

[a] Old rules not necessarily applicable.

The fact that appeals from the district courts in admiralty cases now come to the circuit court of appeals does not make the rules applicable to appeals in such cases to the circuit court before the judiciary act of 1891, govern appeals to the circuit court of appeals.¹⁰ By the express terms of the above section, however, one of those rules is made applicable.

[b] 52nd admiralty rule.

The 52nd admiralty rule is as follows: "The clerks of the district courts shall make up the records to be transmitted to the circuit court [circuit court of appeal] on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel with exhibits annexed thereto.

5. The pleading of the defendants with the exhibits annexed thereto.

6. The testimony on the part of the libellant and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if not excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

⁸See 90 Fed. clviii.

¹⁰The Beeche Dene, 55 Fed. 528, 5 C. C. A. 208.

3. The commissions to take depositions, notices therefor, their captions, and certificate of their being sworn to unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, with the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

Hereafter, in making up the record to be transmitted to the circuit court on appeal the clerk of the district court shall omit therefrom any of the pleadings, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record."

[c]—record in first circuit—testimony to be reduced to writing—costs.

The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52, of the Supreme Court. The testimony in such record shall embrace the viva voce proof in the district court, if the same or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of reducing the same to writing may be taxed as part of the cost of the record, except so far as allowed as costs in the district court (6th paragraph, rule 14, of circuit court of appeals for the first circuit.)

§ 1964. — rule of second and ninth circuits as to apostles on appeal.

The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original party, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question

was referred to a commissioner or commissioners, and, if so, the result of the proceedings and the report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree, and any order of the court which the appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal.

(8) The assignments of error.

Section 1 of 4th admiralty rule in second and ninth circuits.

The following announcement relative to subdivision six, *supra*, was made in the second circuit May 9th 1893:—"Hereafter the provision contained in subdivision 6 of section 1 of rule IV in admiralty, that "all opinions of the court, whether upon interlocutory questions or finally deciding the cause," shall be certified up with the apostles, must be strictly complied with, and such opinions must be printed."

§ 1965. — other papers omitted unless specially ordered.

All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

2nd Section of 4th admiralty rule in second and ninth circuits.

§ 1966. — apostles restricted on special appeals.

When the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

3rd section of 4th admiralty rule in second and ninth circuits.

§ 1967. — filing and certification thereof.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the

clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

Admiralty rule V. of circuit court of appeals for the second and ninth circuits.

§ 1968. — mandamus to compel return of apostles.

A mandamus may, in like manner [i. e., in the circuit court of appeals on motion of an appellant], be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.

Admiralty rule XIII circuit court of appeals for the second circuit.

§ 1969. Opinions to be annexed to record.

In all cases of appeal or writ of error, whether to the Supreme Court or to a circuit court of appeals, the rules require that the opinion or opinions below be annexed to and transmitted with the record.^{[a]-[b]}

Author's section.

[a] The general form of the rule.

In the Supreme Court and in all of the circuit courts of appeal except for the eighth and ninth circuits the rule is as follows:—"In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case." (2nd paragraph of Supreme Court rule 8, promulgated April 28, 1873,² and 2nd paragraph of circuit court of appeals rule 14, in force in first, second, third fourth, fifth, sixth and seventh circuits.)

The first paragraph of rule fourteen of the circuit court of appeals for the ninth circuit provides that the opinion of the court shall be transmitted with the record.

[b] Rule in force in eighth circuit.

In the eighth circuit the rule is as follows:—"In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the court to the jury."³

²15 Wall. V. 90 Fed. clvi.

³2nd par. rule 14, as amended Feb. 10, 1896.

§ 1970. Original papers received in Supreme Court on appeal.

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

4th paragraph of Supreme Court rule 8 as revised December term 1858.⁵

The power of the court below and of the appellate court over the transmission of original papers on appeal should be confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit.⁶ Hence, original affidavits, there being no question as to their authenticity, cannot be sent up.⁷

§ 1971. — rule in circuit court of appeals.

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon a writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

4th paragraph circuit court of appeals rule 14, in force in all circuits.

§ 1972. General instructions as to docketing and printing record.

The instructions issued by the clerk of the circuit court of appeals for the fourth circuit already quoted from,⁹ contain suggestions of value to practitioners generally.^[a]

Author's section.

[a] Docketing and printing record in fourth circuit.

"Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term or adjourned term occurring thereafter provided the record has been or can be printed ten days before the said term or adjourned term. Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant

⁵21 How. VII.

⁷Idem.

⁶Craig v. Smith, 100 U. S. 232, 25 L. ed. 580.

⁹Ante, § 1913.

or plaintiff in error, and also with a deposit of \$25 for account of costs in this court. The clerk of this court will, immediately upon a record being filed, send to the counsel an estimate of the costs of printing, which amount must be deposited within ten days, as provided in rule 23 as amended. A headline at the top of each page, containing the title of the case, should also be printed in the records, so that, when bound in volumes, there shall be not only uniformity in the appearance and style, but the eye will be enabled to catch the particular case at once upon opening the volume. It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ of error is allowed, and not held until the near approach of the next term; especially so when the records are to be printed after filing. It will enable the printer to give more time and attention to the printing, and insure the cases being ready, and the work more correctly done. No record, when once filed, can be withdrawn for the purpose of having it printed elsewhere."¹⁰

§ 1973. Docketing in Supreme Court—dismissal for failure.

It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term-time.^[a] But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before the return day, whether in vacation or in term-time.^[a] the clerk of this court.^[b] If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed.^[c] And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

1st paragraph Supreme Court rule 9, as amended Jan. 26, 1891.¹²

[a] Docketing cases and filing record.

It is established by repeated decisions that where no return has been made by filing the transcript of the record, either before or during the term next succeeding the issuing of the writ or the allowance of the appeal, the appellate court can acquire no jurisdiction and the case will be dismissed.¹³ Such dismissal may be by the court¹⁴ without motion of

¹⁰See 90 Fed.

¹²137 U. S. 710.

¹³Hill v. Chicago etc. R. R. 129 U.

S. 174, 32 L. ed. 651, 9 Sup. Ct. Rep.

269; Hewitt v. Filbert, 116 U. S. 145,

29 L. ed. 582, 6 Sup. Ct. Rep. 320;

either party.¹⁵ An appeal that is not perfected by docketing of the record becomes *functus officio*, but this does not affect the right of the plaintiff in error or appellant to bring a second writ or appeal provided he does so within the statutory period.¹⁶ It is the return and the depositing of the transcript in the clerk's office that keeps the jurisdiction of the appellate court alive, the docketing of the cause after that is mere procedure¹⁷ and may be allowed after the term in the discretion of the court.¹⁸ Under the above rule the record should be filed and the case docketed by or before the return day, which is thirty days from the signing of the citation.¹⁹

[b] — enlargement of time therefor.

The rules regarding the return day and the filing of the transcript are directory, and it is within the sound discretion of the court to relieve parties who have not complied therewith.²⁰ Dismissal has been refused where the transcript was filed a day late, it appearing that an attempt was made to file the transcript the day before but the clerk's office was closed.¹ It has been refused also where the transcript was filed before the return day of the citation, but after the return day of the writ of error, the two return days, through a mistake, not being the same.² The fact that the appellant so long delayed the filing of the record that it was impossible for him to file and furnish to the opposite parties the printed copies of the record and his brief within the time prescribed by the rules, is no ground for dismissing the appeal where the record was filed on time.³ Where, however, the failure to file the transcript is due to fraud of the opposite party, or to the contumacy of the clerk or to an order of the lower court, the time has been enlarged.⁴ Under the above rule such an order of enlargement must be made by the judge who signed the citation or

Caillot v. Deetken, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. Rep. 432; Small v. Northern Pac. R. Co. 134 U. S. 514 33 L. ed. 1006, 10 Sup. Ct. Rep. 614; Villabalos v. United States, 6 How. 90, 12 L. ed. 352; Grigsby v. Purcell, 99 U. S. 507, 25 L. ed. 354; Castro v. United States, 3 Wall. 46, 18 L. ed. 163; German v. United States, 5 Wall. 825, 18 L. ed. 502; Carroll v. Dorsey, 20 How. 207, 15 L. ed. 803; Mussina v. Cavasos, 6 Wall. 358, 18 L. ed. 811; Murdock v. Memphis, 20 Wall. 624, 22 L. ed. 440; Edmonson v. Bloomshire, 7 Wall. 310, 19 L. ed. 92; Credit Co. v. Arkansas, etc. Ry. 128 U. S. 259, 32 L. ed. 449, 9 Sup. Ct. Rep. 107; Wauton v. DeWolf, 142 U. S. 139, 35 L. ed. 965, 12 Sup. Ct. Rep. 173.

¹⁴Grigsby v. Purcell, 99 U. S. 506, 25 L. ed. 354.

¹⁵Edmonson v. Bloomshire, 7 Wall. 310, 19 L. ed. 91.

Fed. Proc.—99.

¹⁶See *Steamer Virginia v. West*, 19 How. 183, 15 L. ed. 594; *United States v. De Pacheco*, 20 How. 263, 15 L. ed. 820.

¹⁷*Edwards v. United States*, 102 U. S. 575, 26 L. ed. 293.

¹⁸*Green v. Elbert*, 137 U. S. 621, 34 L. ed. 794, 11 Sup. Ct. Rep. 188.

¹⁹See ante, § 1950.

²⁰*State of Florida v. Charlotte etc. Co.* 70 Fed. 883, 17 C. C. A. 472.

¹*Farmers etc. Co. v. Chicago etc. R. Co.* 19 C. C. A. 477, 73 Fed. 314.

²*Town of Gilinan v. Fernald*, 141 Fed. 940, (C. C. A.).

³*Jones v. Mann*, 72 Fed. 85, 18 C. C. A. 442.

⁴*Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *United States v. Gomez*, 3 Wall. 752, 18 L. ed. 212; *Green v. Elbert*, 137 U. S. 621, 34 L. ed. 794, 11 Sup. Ct. Rep. 188.

by one of the appellate court, and hence such order signed by a district judge not a member of the circuit court of appeals and who did not sign the citation, is void.⁵

[c] Docketing and dismissal by defendant or appellee.

It seems that if the record is filed by the appellant or plaintiff any time during the return term, it is seasonable, notwithstanding the provisions of the above rule, unless the defendant or appellee has moved for a dismissal.⁶ So where the record has been filed and the cause docketed before the motion to dismiss is made by the appellee the cause will be heard although the return day is past.⁷ Likewise when no motion to dismiss has been made the court will hear a cause although it was not docketed until after the term, if the return was made and the transcript filed within the term.⁸

§ 1974. — rule in circuit court of appeals.

In all save the first, fifth, sixth and ninth circuits the rule as to docketing and dismissal for failure to docket, is the same as in the Supreme Court as given in the preceding section and annotated in the note thereto.¹⁰ The rules in the first,^[a] fifth^[b] and sixth^[c] circuits are given in the note. In the ninth circuit the only change made is the insertion of the words "at San Francisco, California," after the words "clerk of this court" in the first sentence.

Author's section.

[a] Rule in first circuit.

In the first circuit it is provided that "the plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, whether in term time or vacation, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case or file the record, after the same shall have been docketed and dis-

⁵West v. Irwin, 54 Fed. 419, 4 C. C. A. 401.

⁶Nashau etc. R. Corp. v. Boston etc. R. Corp. 61 Fed. 237, 9 C. C. A. 468.

⁷Andrews v. Thum, 64 Fed. 149, 12 C. C. A. 77; West Chicago etc. Railroad Co. v. Ellsworth, 77 Fed. 664, 23 C. C. A. 393.

⁸Edwards v. United States, 102 U. S. 576, 26 L. ed. 293; see also Green v. Elbert, 137 U. S. 621, 34 L. ed. 795, 11 Sup. Ct. Rep. 190.

¹⁰See 1st paragraph C. C. A., rule 16, 90 Fed. lv.

missed under this rule, unless by the order of the court after notice to the adverse party."¹¹

[b] — in fifth circuit.

In the fifth circuit it is provided that "it shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return day, whether in vacation or in term time. But, for good cause shown, any judge of this court may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule unless by order of the court."¹²

[c] — in sixth circuit.

In the sixth circuit the rule provides that "It shall be the duty of the plaintiff in error or appellant, to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court."¹³

¹¹Rule 16, C. C. A. 1st Circuit, 90 Fed. lv. ¹³1st paragraph C. C. A. rule 16, in sixth circuit, as amended Nov. 21,

¹²1st paragraph C. C. A. rule 16, 1898, see 96 Fed. lv. in fifth circuit as amended June 20, 1895, 90 Fed. xcii.

§ 1975. Right of opposite party to docket and file record in Supreme Court.

But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

2nd paragraph Supreme Court rule 9, as amended Jan. 26, 1891.¹⁵

Where the appellee or defendant docket the cause and files the record, the cause may be set for argument.¹⁶ If, however, the appellant also docket the cause and file the record in proper time the case made by the appellee will be dismissed.¹⁷

§ 1976. — rule in circuit court of appeals.

In the second, third, fourth, seventh, eighth and ninth circuits the rule as to docketing by defendant in error or appellee is in the same words as the Supreme Court rule in the preceding section.¹⁹ In the fifth and sixth circuits the change in phraseology is small and unimportant.²⁰ In the first circuit the substance of the rule is not greatly altered.^[a]

Author's section.

[a] Rule in first circuit.

In the first circuit it is provided that "the plaintiff in error or appellee may, at his option docket the case and file the record; and if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument."¹

§ 1977. Docketing admiralty cases in second circuit.

Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk.

Admiralty rule XIV of circuit court of appeals, second circuit.

¹⁵137 U. S. 710.

¹⁶Steamer *Virginia v. West*, 19 How. 182, 15 L. 595.

¹⁷Hartshorn *v. Day*, 18 How. 29, 15 L. ed. 272.

¹⁹See paragraph 2 of C. C. A. rule

²⁰Words "at the term" added at the end of the rule; see 90 Fed. xcii.

¹²2nd paragraph C. C. A. rule 16, 90 Fed. clx.

§ 1978. Appearance of counsel entered when transcript filed.

Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

3rd paragraph Supreme Court rule 9, as revised Dec. term 1870, and of C. C. A. rule 16, in force in all except the first circuit.

In the first circuit the provision is that "on the filing of the record, the appearance of the counsel for the party docketing the case shall be entered." The object of the above rule is to make some attorney of the court responsible for the due prosecution of the suit.³ After such appearance notice to the counsel is usually equivalent to notice to the parties.⁴

§ 1979. Undertaking for clerk's fees upon docketing and filing record.

In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

1st paragraph of Supreme Court rule 10, as amended May 8, 1876,⁵

The clerk is not bound to docket a cause till a bond for his fees is given or he is satisfied on that behalf.⁷ And where no bond is filed and no satisfaction given the writ or appeal will be dismissed,⁸ and will not be reinstated although a bond is subsequently filed.⁹ The practice, since the act of March 3, 1883,¹⁰ has been for the parties to deposit the sum of \$25 in lieu of a fee bond.¹¹

§ 1980. — rule in circuit court of appeals.

In the first and fifth circuits the rule is the same as the Supreme Court rule given in the preceding section.¹³ In other circuits the matter is otherwise regulated by rule.

Author's section.

Thus, in the seventh circuit it is provided that "in all cases the plaintiff in error or appellant on docketing a case and filing the record, shall

³Hurley v. Jones, 97 U. S. 318, 24 L. ed. 1008.

⁴Idem.

⁵91 U. S.

⁷Edwards v. United States, 102 U. S. 577, 26 L. ed. 294; Rensselaer v. Watts, 7 How. 784, 12 L. ed. 913.

⁸Owings v. Tiernan, 10 Pet. 447, 9 L. ed. 490; West v. Brashear, 12 Pet. 101, 9 L. ed. 1016.

⁹Selma etc. R. R. v. La. Nat. Bank, 94 U. S. 253, 24 L. ed. 33.

¹⁰C. 143, 22 Stat. 631, U. S. Comp. Stat. 1901, p. 650.

¹¹Green v. Elbert, 137 U. S. 622, 34 L. ed. 795, 11 Sup. Ct. Rep. 188.

¹³Par. 4, C. C. A. rule 16, 5th circuit; paragraph 1, C. C. A. rule 23, 1st circuit.

enter into an undertaking to the clerk, with surety to be approved by the clerk, for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on demand of the clerk, make further deposits for that use.”¹⁴ In the fourth circuit \$25 deposit is required.¹⁵ In the second, third, sixth, eighth, and ninth circuits, dismissal is the penalty for failure to pay the clerk’s estimate of the costs.¹⁶

§ 1981. Attachment to compel payment of Supreme Court clerk’s fees.

Upon the clerks producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

8th paragraph, Supreme Court, rule 10.

§ 1982. — rule in circuit court of appeals.

In the seventh circuit it is provided that “upon the clerk’s producing satisfactory evidence by affidavit or by the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively to compel the payment of said fees.”¹ There are no specific provisions on the subject in other circuits.

Author’s section.

§ 1983. — fees to be paid before record transmitted to Supreme Court.

In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

Clause 6 of rule 31 of circuit courts of appeals in force in all circuits.

¹⁴1st paragraph C. C. A. rule 23, 7th circuit as amended Feb. 10, 1899, [s]-[t].

⁹¹Fed. xi.

¹⁵See ante, § 1956.

¹⁶See post, § 1993. [h] [i] [o]

[s]-[t].

¹Par. 7 C. C. A. rule 23, 7th circuit.

§ 1984. Form and size of printed records in Supreme Court.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume. After the first day of October, 1880, the clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule.

31st Supreme Court rule, promulgated Dec. 1, 1879.³

§ 1985. — in circuit courts of appeal.

The rules in force in the different circuit courts of appeal as to the form and size of the printed records, arguments and briefs, are not uniform, and it would needlessly expand this chapter to detail them here. They will be found set forth in the appendix of this code.

Author's section.

§ 1986. Printing record in Supreme Court—costs, payment and dismissal for want thereof.

The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

2nd paragraph Supreme Court rule 10.

Since the clerk of the Supreme Court is now required to pay into the Treasury all fees over and above his own compensation and necessary clerk hire and expenses,⁴ it is proper for his protection, that his fees should be paid in advance.⁵

§ 1987. — number of copies to be printed.

Upon payment by either party of the amount estimated by the

³100 U. S. ix.

⁵Steever v. Rickman, 109 U. S.

⁴Act March 3, 1883, C. 143, 22 74, 27 L. ed. 861, 3 Sup. Ct. Rep. 67 Stat. 631, U. S. Comp. Stat. 1901, p. 343.

650.

clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

Paragraph 3 of Supreme Court rule 10.

§ 1988. — transcript to printer—copies of original papers.

In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under rule 8, section 4,⁷ as are necessary to be printed; and of the whole record in cases of original jurisdiction.

4th paragraph of Supreme Court rule 10.

§ 1989. — clerk to supervise printing and distribution.

The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

5th paragraph of Supreme Court rule 10, as adopted Nov. 13, 1882.⁸

§ 1990. — surplus and deficiency of cost to be paid or refunded.

If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

6th paragraph of Supreme Court rule 10.

§ 1991. — statement of errors and portions of record relied on, and printing same—penalty for omitting.

The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have

⁷Ante, § 1970.

⁸106 U. S. vii.

consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

First part of 9th paragraph Supreme Court rule 10, promulgated March 28, 1887.¹⁰

§ 1992. — foregoing rules apply to appeals direct from circuit and district courts.

The plaintiff in error or appellant [in cases of appeal to Supreme Court direct from the circuit or district court¹¹] shall cause the record to be printed, according to the provisions of sections, 2, 3, 4, 5, 6 and 9¹² of rule 10.

§ 2 Supreme Court Rule 35 as adopted May 11, 1891.¹³

Only so much of the record need be printed as will enable the Supreme Court to act understandingly without reference to the transcript.¹⁴ It is held that maps need not be printed with the record. Copies of such maps should, however, be furnished.¹⁵ In cases of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.¹⁶

§ 1993. Copies of records, briefs, etc., to be preserved by clerk in circuit courts of appeals.

Rule 27, in force in all except the fourth and seventh circuits, provides that "the clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein." The 27th rule in the fourth circuit inserts the words "shall cause to be bound and" after the word "clerk," but is other-

¹⁰120 U. S. 785.

¹¹Ante, § 42.

¹²Ante, §§ 1986 to 1991.

¹³139 U. S. 705.

¹⁴Walston v. Nevin, 128 U. S. 579, 32 L. ed. 541, 9 Sup. Ct. Rep. 192.

¹⁵California v. Southern Pac. R. 153 U. S. 245, 38 L. ed. 702, 14 Sup. Ct. Rep. 1138.

¹⁶See ante, § 1853.

wise the same. In the seventh circuit, § 10 of rule 23 provides that "the clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record, and of each brief, printed motion and argument submitted therein."

Author's section.

§ 1994. Printing of record in circuit courts of appeal,—various provisions.

The rules governing the printing and distribution of the record in the various circuits are not identical, and the practitioner must advise himself as to the provisions in any particular circuit.^{[a]-[v]}

Author's section.

[a] First circuit—estimate of costs—dismissal on failure to print.

"The clerk shall cause an estimate to be made of the cost of the printing the record, and of his fee for preparing it for the printer, and shall notify the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed."¹⁸

[b]—number of copies to be printed.

"Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel."¹⁹

[c]—transcript to be taken by clerk to printer—copies of original papers to be made.

"The clerk shall take to the printer the original transcript on file but shall cause copies to be made for the printer of such original papers sent up under rule 14,²⁰ or other original papers, as are necessary to be printed."¹

[d]—clerk to supervise—distribution.

"The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel of each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court."²

¹⁸2nd paragraph C. C. A. rule 23, 1st circuit. 14th paragraph C. C. A. rule 23, 1st circuit.

¹⁹3rd paragraph C. C. A. rule 23, 1st circuit. 25th paragraph C. C. A. rule 23, 1st circuit.

²⁰Ante, § 1971.

[e] — parts only may be printed.

"The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record."³

[f] — portions previously printed may be used.

"The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and from a part of the costs of printing."⁴

7th paragraph of rule 23, circuit court of appeals for the first circuit.

[g] — surplus or deficiency to be paid or refunded.

Paragraph 8 of the 23d rule for the first circuit is the same as paragraph 6 of Supreme Court rule 10.⁵

[h] Second circuit—printing, payments, and dismissal for failure.

"On the filing of the transcript, in every case, the clerk shall forthwith cause fifteen copies of the same to be printed and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed."⁶

[i] Third circuit—number of copies—part only printed—dismissal for failure.

"On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is

³6th paragraph C. C. A. rule 23, 1st circuit.

⁴7th paragraph C. C. A. rule 23, 1st circuit.

⁵Ante, § 1990.

⁶Part of rule 23, C. C. A. 2nd circuit as amended Oct. 19, 1891.

Omitted portion is given elsewhere; see ante, § 1853.

reached in the regular call of the docket because of the failure of a party to advance the cost of printing, the case may be dismissed.”⁷

[j] — papers already printed may be used.

“The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.”⁸

[k] Fourth circuit.

“1. Hereafter all records shall be printed under the supervision of the clerk, by such printer and at such rate as the court may designate. 2. Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term. 3. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. 4. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed.”¹⁰

[l] Fifth circuit—estimate of costs,—payment,—dismissal for failure to pay.

“The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court.”¹²

[m] — distribution of copies—printing of part only.

“The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter fur-

⁷Part 1st paragraph, C. C. A. rule 23, as amended Dec. 7, 1893; omitted portion is given elsewhere; ante, § 1853.

⁸2nd paragraph C. C. A. rule 23, 3rd circuit.

¹⁰Rule 23, C. C. A. 4th circuit as amended May 19, 1898.

¹²1st paragraph C. C. A. rule 23, 5th circuit as amended Jan. 12, 1905.

nish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.”¹³

[n] — other provisions.

“3. The clerk shall not take to the printer the original transcript on file but shall cause copies to be made for the printer of such original papers sent up under rule 14 or other original papers as are necessary to be printed.

“4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

“5. The clerk shall supervise the printing and see that the printed record is properly indexed. He shall distribute the printed copies to the judges of the court and to the reporter from time to time as required. If the cost of printing the record together with the clerk’s fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk’s fee shall exceed the clerk’s estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

“7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing.”¹⁴

[o] Sixth circuit.

“1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or the appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion.

“2. After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same and shall furnish to each of the respective parties three (3) copies thereof, and take a receipt therefor.

¹³2nd paragraph C. C. A. rule 23, 5th circuit.

¹⁴Paragraphs 3, 4, 5, 7 C. C. A. rule 23, 5th circuit.

"3. Parties may agree by written stipulation filed with or prior to the filing of the record that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

"The plaintiff in error or appellant may, within ten days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within fifteen days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not do so he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant.

"If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record.

"If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require.

"If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper.

"If good cause be shown the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session or by either circuit judge if eligible to sit in the cause.

"4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof."¹

[p] — record printed below—certificate required.

"In any case where the record shall have been printed in the court below either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee provided in table of costs rule 31² shall be charged and collected by the clerk."

[q] — bids and contracts.

"The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may in his discretion award

¹Par. 1-4, C. C. A. rule 23, 6th circuit.

²Par. 6, C. C. A. rule 23, 6th circuit amended Nov. 21, 1898.

such printing to the lowest and best bidder and all such printing shall be done by the person to whom the same is so awarded. And when a case be heard upon a record printed in the court below the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.”³

[r] Seventh circuit.

“2. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

“3. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case may be heard only on the parts so printed, unless the court shall direct the printing of other parts.

“4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

“5. The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk’s fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk’s fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof.

“8. The clerk shall adopt a uniform size for the printing of all records, shall have them printed in small pica type, on clear white paper with a margin of not less than an inch and a half, and show by a note or memorandum on the margin the time when each pleading or document was filed, and at the top of the pages shall insert running titles of their contents.

“11. In any case where the record shall have been printed in the court below, the presiding judge may, on the application of the plaintiff in error or appellant, order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to

³Par. 7, C. C. A. rule 23, 6th circuit.

be printed and attached to the printed record an index thereof, and shall be paid the same fees for the indexing and supervision thereof as if printed under his supervision.

"12. The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies when printing may be done by another at the same or less price. And, when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid."⁴

[s] Eighth circuit.

"1. The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party within twenty days thereafter may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper.

"2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least thirty days before the argument.

"3. The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

"4. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the cost of printing, the case may be dismissed."⁵

[t] Ninth circuit—various provisions.

"1. Hereafter all records shall be printed under the supervision of the clerk, and, upon the docketing of a cause, he shall cause an estimate to be

⁴Pars. 2, 3, 4, 5, 8, 11 and 12, C. C. A. rule 23, 8th circuit.
⁵Pars. 1-4, C. C. A. rule 23, 8th circuit.

made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

"2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

"3. In cases of appellate jurisdiction, the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4,⁸ as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

"4. The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel of the respective parties.

"5. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the expense is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel."¹⁰

[u]—Statement of errors relied on—portions of record to be printed.

"The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ten days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper. All statements and stipulations

⁸See ante, §§ 1970-1971.

¹⁰Pars. 1-5, C. C. A. rule 23, 9th circuit.

filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.”¹²

[v] Copies of patent drawings in record.

“At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same if in proper form and of convenient size, shall be used in printing the record.”¹⁴

§ 1995. Translations, how supplied.

Whenever any record, transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

Supreme Court rule 11, as revised Dec. term 1858, and rule 15 of circuit court of appeals, in force in all circuits.

§ 1996. Printing new pleadings and testimony in admiralty appeals in second and ninth circuits.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk as in the 23rd general rule provided.

Admiralty rule X circuit court of appeals for second circuit, promulgated May 20, 1892 and Rule 10, for the ninth circuit, adopted May, 21, 1900.

§ 1997. Certiorari for diminution of record.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry

¹²Par. 7, C. C. A. rule 23, 9th circuit.

¹⁴Par. 8th C. C. A. rule 23, 9th circuit, as amended Mar. 2, 1900.

of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.^{[a]-[b]}

Supreme Court rule 14, and circuit court of appeals rule 18, in force in all circuits.

[a] In general.

Certiorari is used as an auxiliary process to bring up a full record of a case already before the appellate court¹ and hence it is the proper remedy for a deficient or incomplete transcript.² Thus it may be used where the judgment of the lower court has been omitted from the record,³ or upon the omission of the citation, or material portions of the evidence,⁴ or other necessary parts of the record.⁵ It cannot, however, be used to correct errors which exist in the record as it stands in the lower court.⁶ Nor can it be used to show additional facts not in the findings,⁷ nor to correct a transcript from which the clerk's certificate is omitted.⁸ It has been dispensed with where a necessary part of the record, which was omitted, was duly certified up to the appellate court, a direct order of the court making the omitted portion part of the record, being sufficient.⁹

[b] The motion.

Since the record as filed is presumptively correct the court, under the above rule, upon an ex parte affidavit, will not cause the record to be amended by inserting a paper of which neither the master nor the attorney for the appellee has any recollection. Certiorari for diminution of the record must be applied for at the first term of the court or cause shown for the delay.¹¹ It has been allowed, although the motion therefor was made after the term, upon showing that the counsel resided in California and were ignorant of the rule.¹² An early case holds that the return to the writ may be made by the clerk of the lower court instead of the judge thereof.¹³

¹American Construction Co. v. L. ed. 759, 8 Sup. Ct. Rep. 834; Good-Jacksonville etc. Ry. 148 U. S. 380, enough etc. Co. v. Rhode Island etc. 37 L. ed. 486, 13 Sup. Ct. Rep. 758. Co. 154 U. S. 636, 24 L. ed. 368, 14

²Fleckinger v. Bank, 145 Fed. 162, Sup. Ct. Rep. 1180.

(C. C. A.) The Rio Grande, 19 ⁷U. S. v. Adams, 9 Wall. 661, 19

Wall. 188, 22 L. ed. 60; United States L. ed. 808.

v. Gomez, 1 Wall. 702, 17 L. ed. 677; ⁸Hodges v. Vaughan, 19 Wall. 12, 22 L. ed. 46.

Hudgins v. Kemp, 18 How. 534, 15 ⁹Burnham v. Railroad Co. 87 Fed. 168, 30 C. C. A. 594.

L. ed. 511; Mandeville v. Burt, 8 ¹¹Chappell v. United States, 160 U. S. 505, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

Pet. 256, 8 L. ed. 936. ¹²Stearns v. United States, 4 Wall. 1, 18 L. ed. 451.

³Sweeney v. Lomme, 22 Wall. 215, ¹³Stewart v. Ingle, 9 Wheat. 526, 6 L. ed. 151.

⁴Field v. Milton, 3 Cranch, 514, 2

⁵Merrill v. Floyd, 50 Fed. 849, 2

⁶Hoskin v. Fisher, 125 U. S. 224, 31

§ 1998. One record sufficient where both parties appeal.

Where appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases.

R. S. § 1013, U. S. Comp. Stat. 1901, p. 716.

The above section was carried into the revised statutes from an act of 1861.¹⁴ Where both parties appeal in an admiralty cause both may assign error.¹⁵ But, if only one party appeals, the other cannot be heard except in support of the decree appealed from.¹⁶ R. S. § 1013 must now be deemed to apply also to review in the circuit court of appeals.¹⁷

¹⁴Act Aug. 6, 1861, C. 61, § 1, 12 Stat. 319.

¹⁵The *Maria Martin*, 12 Wall. 40, 20 L. ed. 251.

¹⁶The *Maria Martin*, 12 Wall. 41, 20 L. ed. 251; The *Mabey*, 13 Wall. 741, 20 L. ed. 474.

¹⁷*Ante*, § 1880.

CHAPTER 60.

BOND AND SUPERSEDEAS.

- § 2009. Bond in error and on appeal.
- § 2010. No Bond required of United States.
- § 2011. Security for appeals from revenue decisions of Board of Appraisers.
- § 2012. Supersedeas.
- § 2013. —on appeal or error direct from circuit and district courts.
- § 2014. Supreme Court rule as to amount of supersedeas bond.
- § 2015. —rule in circuit court of appeals.
- § 2016. Writ of error as supersedeas in capital cases.
- § 2017. —execution postponed until mandate returned—subsequent proceedings.
- § 2018. Effect of writ of error to State court.
- § 2019. No suspension of work of commission of Five Civilized Tribes pending appeal to Supreme Court.
- § 2020. Stay on appeal from interlocutory injunction order—additional bond.
- § 2021. —bond on interlocutory injunction appeal.
- § 2022. —stay on appeal from final injunction decree.
- § 2023. Appeal bond in admiralty cases in second and ninth circuits.
- § 2024. —bond for supersedeas.
- § 2025. exception to sureties and justification.
- § 2026. —writ of inhibition to stay proceedings below.
- § 2027. Commerce Commission's order not vacated on appeal.

§ 2009. Bond in error and on appeal.

Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security^{[a]-[c]} that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.^[d]

R. S. § 1000, U. S. Comp. Stat. 1901, p. 712.

[a] Taking and approval of bond.

The meaning of the section is that a judge who signs the citation on an appeal or writ of error or who is authorized to sign such citation¹ shall take security that the appellant or plaintiff in error shall prosecute his writ or appeal to effect.² And this power of taking security cannot be delegated to the clerk³ or to a commissioner.⁴ Irregularities in the bond do not render a writ of error void.⁵ Hence, it is no ground for dismissal that the bond was approved by the clerk instead of the judge, but under the direction of the court, and such irregularity may be remedied by filing a proper bond.⁶ It is sufficient if the bond is approved by a judge out of court, even though there be an entry on the minutes and on the order book of the court, requiring the bond to be approved by the court.⁷

[b] Necessity of bond—when to be filed.

While an appeal is not perfected without a bond or undertaking,¹⁰ and while the failure to execute the bond within due time may be ground for dismissing the appeal,¹¹ the bond is not jurisdictional and hence it may be waived by the parties,¹² or may be supplied in the appellate court,¹³ if omitted or defectively executed in the court below.¹⁴ But the application to file the appeal bond in the appellate court should be reasonably made, and the appeal will be dismissed where this is not done,¹⁵ or where the party appealing fails to comply with the order of the court prescribing the time in which the bond is to be filed.¹⁶ The fact that a bond is executed before the judgment sought to be reviewed was in fact entered does not render the bond defective, it not having been delivered until after the entry of judgment.¹⁷ Upon the question whether a party may be allowed to take an appeal or sue out a writ of error in forma pauperis, without bond,

¹*Brown v. Life Ins. Co.* 119 Fed. 148, 55 C. C. A. 654. *Lockman v. Lang*, 132 Fed. 1, 65 C. A. 621.

²*Providence, etc. Ins. Co. v. Wager*, 37 Fed. 59.

³*O'Reilly v. Edrington*, 96 U. S. 724, 24 L. ed. 659; *First Nat. Bank v. Omaha*, 96 U. S. 737, 24 L. ed. 881.

⁴*Haskins v. St. Louis, etc. R. Co.* 109 U. S. 106, 27 L. ed. 873, 3 Sup. Ct. Rep. 72.

⁵*Amadeo v. Northern, etc. Co.* 201 U. S. 194, 50 L. ed. 722, 26 Sup. Ct. Rep. 507.

⁶*Chicago, etc. Co. v. Chicago Directory Co.* 65 Fed. 463, 13 C. C. A. 8.

⁷*Hudgens v. Kemp*, 18 How. 530, 15 L. ed. 511.

¹⁰*Beardsley v. Arkansas, etc. R. Co.* 158 U. S. 126, 39 L. ed. 921, 15 Sup. Ct. Rep. 786; *Boyce v. Grundy*, 6 Pet. 777, 8 L. ed. 579; see also

¹¹*Green v. Elbert*, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188.

¹²*Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

¹³*Brown v. McConnell*, 124 U. S. 492, 31 L. ed. 495, 8 Sup. Ct. Rep. 559; *Shepherd v. Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438.

¹⁴*Seymour v. Freer*, 5 Wall. 822, 18 L. ed. 564; *Brobst v. Brobst*, 2 Wall. 96, 17 L. ed. 905.

¹⁵*Beardsley v. Arkansas, etc. R. Co.* 158 U. S. 123, 39 L. ed. 921, 15 Sup. Ct. Rep. 786.

¹⁶*Seymour v. Freer*, 5 Wall. 822, 18 L. ed. 564; *Anson v. Blue Ridge R. Co.* 23 How. 1, 16 L. ed. 517.

¹⁷*Chateaugay Ore, etc. Co. v. Blake*, 35 Fed. 804.

the decisions in the circuit court of appeals are not uniform.¹⁸ The Supreme Court has, however, expressly held that a writ of error cannot be granted to a State court, in forma pauperis and that security must be required.¹⁹

[c] Parties thereto and contents thereof.

The bond on appeal must be given to a party to the judgment,³ and the appeal will be dismissed if the sole payee is neither a defendant in error nor an appellee.⁴ The bond is not affected, however, because it runs to a party as to whom the suit was dismissed, as well as to others.⁵ Where the suit is by the people, on relation, an appeal bond to the people or to the relator is sufficient, as it may be sued on by either.⁶ An appeal bond in which the sureties are not bound each for the full amount, but each for a separate part thereof may be allowed at the discretion of the judge.⁷ The bond must state the proper number of plaintiffs in error or the writ will be dismissed.⁸ But it is not invalidated by failure to name the appellate court, or the nature of the action,⁹ nor by the omission of the names of the sureties in the introductory part where it is properly signed and sealed by them.¹⁰

[d] Conditions.

A condition that the appellants "shall prosecute appeal with effect and pay costs and damages rendered and to be rendered in case decree affirmed in Supreme Court" is sufficient,¹³ as is also a condition that the appellant, "shall prosecute its writ of error to effect, and answer all damages and costs if it shall fail to make the plea good."¹⁴ A condition, however, to answer all damages and costs "in the event the decree is affirmed" instead of "if he fails to make his plea good" has been held insufficient.¹⁵

§ 2010. No bond required of United States.

, Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court,

¹⁸See ante, § 1823, et seq.

¹⁹Gallaway v. State Nat. Bank, 186 U. S. 177, 46 L. ed. 1111, 22 Sup. Ct. Rep. 811.

³Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879; Bigler v. Walker, 12 Wall. 142, 20 L. ed. 260; Swan v. Hill, 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 178.

⁴Davenport v. Fletcher, 16 How. 142, 14 L. ed. 879.

⁵Hill v. Chicago, etc. Ry. 129 U. S. 175, 32 L. ed. 651, 9 Sup. Ct. Rep. 269.

⁶Spalding v. New York, 2 How. 66, 11 L. ed. 181.

⁷New Orleans, etc. Co. v. Albro Co. 112 U. S. 506, 28 L. ed. 809, 5 Sup. Ct. Rep. 289.

⁸Kail v. Wetmore, 6 Wall. 451, 18 L. ed. 862.

⁹Smith v. Walker, Hempst. 289, Fed. Cas. No. 13,123a.

¹⁰Babbitt v. Finn, 101 U. S. 7, 25 L. ed. 820.

¹³Gay v. Parpart, 101 U. S. 392, 25 L. ed. 841; see also Gunn v. Black, 60 Fed. 160, 8 C. C. A. 542.

¹⁴Chateaugay, etc. Co. v. Blake, 35 Fed. 804.

¹⁵Peace River, etc. Co. v. Edwards, 70 Fed. 728, 17 C. C. A. 358.

or a circuit court,¹⁸ either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxably against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted.

R. S. § 1001, U. S. Comp. Stat. 1901, p. 713.

Under the provisions of the above section an appeal under the direction of the Comptroller of Currency, in suits by or against insolvent national banks requires no bond.¹⁹ The section is not affected by the adoption of state practice in the Federal court,²⁰ and hence the government cannot be required to give bond, even though under the particular State practice such bond is required.¹ So also where, under the statutes of the District of Columbia, a bond is required upon attachment, the above section relieves the government from such undertaking.²

§ 2011. Security for appeals from revenue decisions of Board of Appraisers.

On such original application [to the circuit court to review the board of general appraisers' decision upon a classification of merchandise and the rate of duty imposed] and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party.

Part of § 15, act June 10, 1890, c. 407, 26 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

§ 2012. Supersedeas.

In any case where a writ of error may be a supersedeas,^{[a]-[b]} the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation.^[c] But if

¹⁸This would not apply to circuit court of appeals. See ante, § 1890.

¹⁹Pacific Bank v. Mixer, 114 U. S. 463, 29 L. ed. 221, 5 Sup. Ct. Rep. 944; Robinson v. Southern, etc. Bank, 94 Fed. 22.

²⁰Ante, § 900.

¹United States v. Bryant, 111 U. S. 499, 28 L. ed. 496, 4 Sup. Ct. Rep. 601.

²United States v. Ottman, 1 Hughes, 313, 23 Int. Rev. Rec. 294, Fed. Cas. No. 15,977.

he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court.^[d] And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days.^[e]

R. S. § 1007, as amended 1875⁶ U. S. Comp. Stat. 1901, p. 714.

[a] When writ of error or appeal may be supersedeas.

A writ of error does not operate as a supersedeas unless a copy of the writ shall be filed in the clerk's office, for the other party, within sixty days, excluding Sundays, as provided in the above statute.⁷ So in the case of an appeal, since appeals are subject to the same rules regulations and restrictions as are prescribed in case of writs of error,⁸ if the same is duly taken and security filed within the statutory time it may operate as a supersedeas also.⁹ Hence, supersedeas will be allowed where an appeal from the decree has been prayed in open court and the appeal bond filed in court and approved by one of the judges.¹⁰ Supersedeas is, however, a statutory right and is only obtained by a strict compliance with all the required conditions.¹¹ Hence, the service of the writ of error, or the taking of the appeal within the statutory time are indispensable prerequisites to a supersedeas,¹² and when the writ is not so served or the appeal is not so taken, it is established that a supersedeas cannot be awarded subsequently either by the Supreme Court,¹³ or by the circuit court¹⁴ or by the circuit court of appeals.¹⁵ Neither is a nunc pro tunc order effectual for such purpose unless it appears that the delay was the act of the court and not of the parties, and that no injustice will be done.¹⁶

⁶Act Feb. 18, 1875, c. 80, 18 Stat. 380.

⁷Kitchen v. Randolph, 93 U. S. 92, 23 L. ed. 810; Foster v. Kansas, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 8, 97; Rutherford v. Pennsylvania, etc. Ins. Co. 1 Fed. 459, 1 McCrary, 120; Wurts v. Hoagland, 105 U. S. 703, 26 L. ed. 1109.

⁸Ante, § 1929.

⁹Kitchen v. Randolph, 93 U. S. 89, 23 L. ed. 810; see also Adams v. Law, 16 How. 148, 14 L. ed. 882; Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511; French v. Shoemaker, 12 Wall. 100, 20 L. ed. 272; Bigler v. Walker, 12 Wall. 149, 20 L. ed. 262.

¹⁰Railroad Co. v. Bradleys, 7 Wall. 577, 19 L. ed. 274.

¹¹Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 933.

¹²Kitchen v. Randolph, 93 U. S. 92, 23 L. ed. 812.

¹³Sage v. Railroad Co. 93 U. S. 417, 23 L. ed. 933; Peugh v. Davis, 110 U. S. 228, 28 L. ed. 128, 4 Sup. Ct. Rep. 18; Brown v. Evans, 18 Fed. 57, 8 Sawy. 502; Union Mutual Ins. Co. v. Windett, 36 Fed. 839; Wallen v. Williams, 7 Cranch, 278, 3 L. ed. 342; Hogan v. Ross, 11 How. 294, 13 L. ed. 702; United States v. Curry, 6 How. 113, 12 L. ed. 363.

¹⁴New England R. Co. v. Hyde, 101 Fed. 398, 41 C. C. A. 404; Brown v. Evans, 18 Fed. 58, 8 Sawy. 502.

¹⁵New England R. Co. v. Hyde, 101 Fed. 398, 41 C. C. A. 404; Logan v. Goodwin, 101 Fed. 654, 41 C. C. A. 573.

¹⁶Sage v. Central, etc. R. Co. 93 U. S. 418, 23 L. ed. 935.

[b] When statutory period commences to run.

The term within which a writ of error must be served in order that it may operate as a supersedeas must be computed from the date of the judgment which is the subject of review.¹⁹ Exceptional cases may arise however, where the judgment or decree given on appeal in the highest court of a State is required by State law to be returned to the lower State court for execution and in such cases the time commences to run only from the return entry of the proceedings in such lower State court.²⁰ It does not commence to run pending the motion for a new trial;¹ nor, when the court entertains a motion to open the final decree for certain purposes, does the time begin to run until such motion is disposed of;² nor does the time run pending motion to set aside judgment after new trial.³

[c] Supersedeas how obtained—filing of writ.

It is not necessary providing everything has been done as required by the statute, for a court or judge to make an order that a writ of error or appeal operate as a supersedeas. It becomes so per se upon compliance with the statute.⁴ Hence, no order of the court is usually given in such case, although in some courts the practice has been occasionally for counsel to ask that a special order shall be entered by the court or judge declaring the writ of error a supersedeas.⁷ Application for a supersedeas should not, however, be made to the appellate court.⁸ It cannot be allowed except as incident to an appeal actually allowed or a writ actually issued.⁹ When the approval of it is obtained by fraud, it may be vacated.¹⁰

Under the provisions of the judiciary act of 1789¹¹ the time within which the writ must be served or the appeal taken in order to be a supersedeas was ten days instead of sixty as provided in the above section.¹² That act remained in force until the act of 1872¹³ was passed.

While the service of the writ of error within the proper time is a prerequisite to the obtaining of a supersedeas, it is held that the manner of

¹⁹Slaughter House Cases, 10 Wall. 291, 19 L. ed. 921; Wurts v. Hoagland, 105 U. S. 701, 26 L. ed. 1109.

²⁰Slaughter House Cases, 10 Wall. 291, 19 L. ed. 921.

¹Brown v. Evans, 18 Fed. 60, 8 Sawy. 502; Rutherford v. Pennsylvania, etc. Ins. Co. 1 Fed. 456, 1 McCrary, 120.

²Washington, etc. R. Co. v. Bradleys, 7 Wall. 575, 19 L. ed. 274; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251.

³Kingman v. Western Mfg. Co. 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

⁶Tiernan v. Booth, 4 Fed. 621, 9 Biss. 499; Slaughter House Cases, 10 Wall. 291, 19 L. ed. 920; Goddard v. Ordway, 94 U. S. 673, 24 L. ed. 238; Kitchen v. Randolph, 93 U. S. 88, 23

L. ed. 811; Arnold v. Frost, 9 Ben. 267, Fed. Cas. No. 558; Butchers Assn. v. Slaughter House Co. 1 Woods, 50, Fed. Cas. No. 2,234.

⁷Tiernan v. Booth, 4 Fed. 621, 9 Biss. 499.

⁸Covington, etc. Co. v. Keith, 121 U. S. 250, 30 L. ed. 914, 30 Sup. Ct. Rep. 881.

⁹Ex parte Ralston, 119 U. S. 615, 30 L. ed. 506, 7 Sup. Ct. Rep. 317.

¹⁰Railroad Co. v. Schutte, 100 U. S. 644, 25 L. ed. 605.

¹¹Act Sept. 24, 1789, c. 20, 1 Stat. 85.

¹²Adams v. Law, 16 How. 144, 14 L. ed. 880; Hudgins v. Kemp, 18 How. 530, 15 L. ed. 511; Silsby v. Foot, 20 How. 290, 15 L. ed. 822.

¹³Act June 1, 1872, c. 255, 17 Stat.

serving the same and the filing of the writ in the clerk's office are mere matters of form, and hence the fact that the original writ instead of a copy thereof, as provided in the section, was served on the clerk is immaterial.¹⁶

[d] Security may be given after writ filed or appeal taken.

Where the writ of error has been filed and served as provided in the first part of the above section, a stay on the execution may be had as a matter of right by giving the required security any time within sixty days from the entry of the final judgment or decree, or the stay may be had after the expiration of such time at the discretion of the justice or judge.¹⁹ So also in the case of an appeal, if it is allowed without the statutory sixty days, by the court acting judicially and in term time, the bond may be filed subsequently within the sixty days, or after the expiration of that time if the court so allows.²⁰ Early cases have held that the appeal must be taken and the bond filed within the statutory period in order that the appeal operate as a supersedeas,¹ but those cases were decided prior to the act of 1872² the provisions of which act are incorporated into the second sentence of the above section. The sixty days mentioned during which the execution may be stayed upon giving security, do not include Sundays.³

[e] Execution when to issue when writ is supersedeas.

As the above section originally stood, no execution could issue, when the writ of error might be a supersedeas, until the expiration of sixty days, the time allowed for perfecting a supersedeas without leave.⁷ By the amendment of 1875, however, the time was changed from sixty to ten days. The provision that where a writ of error may operate as a supersedeas, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to judgments of the courts of the United States.⁸ Hence, the rule is inapplicable to State judgments.⁹ Sundays are to be excluded in the computation of the ten days.¹⁰ The time commences to run from the date of the entry of the judgment and not from the date when the same was signed by the judge.¹¹ Where the ten days have expired and the execution has issued, a supersedeas subsequently obtained only operates to stay further proceedings, it cannot interfere with what has already been done.¹²

¹⁶McCarley v. McGhee, 108 Fed. 497.

¹⁹Kitchen v. Randolph, 93 U. S. 91, 23 L. ed. 812.

²⁰Peugh v. Davis, 110 U. S. 228, 28 L. ed. 128, 4 Sup. Ct. Rep. 17.

¹Adams v. Law, 16 How. 148, 14 L. ed. 882; French v. Shoemaker, 12 Wall. 100, 20 L. ed. 272.

²Act June 1, 1872, c. 255, 17 Stat. 198.

³Danville v. Brown, 128 U. S. 503, 32 L. ed. 507, 9 Sup. Ct. Rep. 149.

⁷Kitchen v. Randolph, 93 U. S. 91, 23 L. ed. 812.

⁸Doyle v. Wisconsin, 94 U. S. 50, 24 L. ed. 64.

⁹Foster v. Kansas, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 8, 97.

¹⁰Danielson v. Northwestern Fuel Co. 55 Fed. 49.

¹¹Commissioners v. Gorman, 19 Wall. 665, 22 L. ed. 226.

¹²Commissioners v. Gorman, 19 Wall. 665, 22 L. ed. 226; Kitchen v. Randolph, 93 U. S. 89, 23 L. ed.

§ 2013. — on appeal or error direct from circuit and district courts.

The proper security [may be taken by any justice of the Supreme Court, any circuit judge within his circuit, or by any district judge within his district, on appeal or error direct from a circuit or district court to the Supreme Court under the circuit court of appeals act of 1891¹⁶] . . . and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

Part of paragraph 1, of 36th Supreme Court rule promulgated May 11, 1891.¹⁷

Subsequent to the act of March 3, 1891, and prior to the adoption of the 36th Supreme Court rule, of which the above section is a part, there was no direct provision of Congress regulating the supersedeas, or bond or other security in cases either civil or criminal brought to the Supreme Court from the circuit or district courts. Congress evidently considered these matters to be governed by the provisions of the earlier statutes.¹⁸ Under this section security may be taken and supersedeas allowed by any Supreme Court justice.¹⁹ So on conviction of a crime not capital, a supersedeas may be granted by the Supreme Court or any justice thereof²⁰ and if in such case the justice signing the citation direct that the writ of error operate as a supersedeas the supersedeas may be obtained by merely filing the writ within sixty days as provided by statute,¹ no security being required.²

§ 2014. Supreme Court rule as to amount of supersedeas bond.

Supersedeas bonds in the circuit court must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of

811; see also, *Doyle v. Wisconsin*, 94 U. S. 52, 24 L. ed. 65.

¹⁶See ante, § 42.

¹⁷139 U. S. 706.

¹⁸*Hudson v. Parker*, 156 U. S. 282, 39 L. ed. 427, 15 Sup. Ct. Rep. 450.

¹⁹*Hudson v. Parker*, 156 U. S. 284, 39 L. ed. 427, 15 Sup. Ct. Rep. 450.

²⁰In *re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; ante § 2009.

¹In *re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; see also *Hudson v. Parker*, 156 U. S. 283, 39 L. ed. 427, 15 Sup. Ct. Rep. 450.

²*Ibid*, see also ante, § 1547.

the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and "just damages for delay," and costs and interest on the appeal.

29th Supreme Court rule promulgated originally as rule 32, December term 1867.⁶

[a] — supersedeas bonds how taken.

The security required by law on the issuing of the citation is security to "answer all damages and costs."⁷ Hence, where the bond contains no security for costs it is insufficient for purposes of supersedeas.⁸ While the amount of the bond and sufficiency of sureties is left to the discretion of the judge allowing the appeal or writ of error,⁹ additional security may be ordered by the appellate court where for some reason the amount is no longer sufficient.¹⁰ The change, however, is discretionary with the appellate court,¹¹ and it has been refused where the alleged insufficiency was not proved,¹² or the depreciation of the security not sufficiently shown.¹³ But upon facts existing at the time the appeal bond was accepted the action of the judge accepting, if within the statutes and rules of practice, is final and presentation to him of every possible fact at that time will be presumed.¹⁴

[b] Amount of bond where judgment is for recovery of money.

Under the above section where the judgment or decree is for the recovery of money not otherwise secured, the security must be for the whole amount of the judgment or decree.¹⁷ This rule was followed by the Supreme Court, prior to the promulgating of the above Court rule, both on appeal¹⁸ and on writ of error.¹⁹

⁶Wall. v.

⁷See ante, § 2009.

⁸Seward v. Corneau, 102 U. S. 162, 26 L. ed. 86; Deford v. Mehaffy, 13 Fed. 490.

⁹Jerome v. McCarter, 21 Wall. 28, 22 L. ed. 515.

¹⁰Jerome v. McCarter, 21 Wall. 31, 22 L. ed. 515; Rubber Co. v. Goodyear, 6 Wall. 156, 18 L. ed. 762. Mexican Const. Co. v. Reusens 118 U. S. 49, 30 L. ed. 77, 6 Sup. Ct. Rep. 945; Williams v. Claflin, 103 U. S. 753, 26 L. ed. 606.

¹¹French v. Shoemaker, 12 Wall. 99, 20 L. ed. 271.

¹²Harwood v. Dieckerhoff, 117 U.

S. 200, 29 L. ed. 887, 6 Sup. Ct. Rep. 669.

¹³Mexican Const. Co. v. Reusens, 118 U. S. 53, 30 L. ed. 78, 6 Sup. Ct. Rep. 945.

¹⁴Jerome v. McCarter, 21 Wall. 31, 22 L. ed. 515; New Orleans Ins. Co. v. Albro Co. 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289.

¹⁷Jerome v. McCarter, 21 Wall. 30, 22 L. ed. 515; The Holladay Case, 28 Fed. 117.

¹⁸Stafford v. Union Bank, 16 How. 139, 14 L. ed. 878.

¹⁹Catlett v. Brodie, 9 Wheat. 553, 6 L. ed. 158.

[c] Amount of bond where property follows the event of the suit.

Where the property in controversy necessarily follows the event of the suit, as in an action upon a mortgage, the amount of the bond is in the discretion of the court subject to the provisions of the rule.² The bond in such a case operates as security only for the costs of the appeal, the deterioration of the property and perhaps the burdens accruing upon it by nonpayment of the taxes. It does not operate to secure the amount of the original decree nor the interest accruing thereon pending the appeal, nor the balance due after applying the proceeds of the mortgaged premises, nor for the rents and profits, or the use and detention of the property pending the appeal.³ Where, however, the mortgaged property has been ordered sold, and the appeal is from such order the bond secures the rents and profits pending appeal, and such may be recovered thereon being damages incurred by reason of the appeal.⁴

§ 2015. — rule in circuit court of appeals.

Supersedeas bonds in the circuit and district courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

1st paragraph rule 13, circuit court of appeals, in force in all circuits.

Under the above section, on an unsecured money judgment the bond must be for the whole amount of such judgment including just damages for the delay and costs and interest on the appeal.⁵ A judgment is otherwise

²Jerome v. McCarter, 21 Wall. Kennicott, 103 U. S. 557, 26 L. ed. 31, 22 L. ed. 515; United States v. 488.
New Orleans, 8 Fed. 112.

³Kountze v. Omaha Hotel Co. 107 Co. 185 U. S. 362, 46 L. ed. 949, 22 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Srp. Ct. Rep. 676.
Rep. 911; see also Supervisors v. ⁴Woodworth v. Mutual, etc. Ins.
⁵Fuller v. Aylesworth, 75 Fed. 694, 21 C. C. A. 505.

secured within the meaning of the rule when the court has, by reason of a lien on property secured to plaintiff otherwise than by the judgment, or by reason of actual custody of property liable to satisfy the asserted claims, the means of enforcing the judgment by subjecting specific property.⁹ So a decree which declares a lien on specific property, and requires payment of a sum of money, is not a decree for the recovery of money not otherwise secured, within the meaning of the rule.¹⁰ A judgment for the recovery of money is one which adjudges a defendant either as an individual or in a representative capacity absolutely liable to pay a sum certain to the plaintiff. The fact that the judgment does not involve the personal liability of the defendant is immaterial.¹¹ The fact that the amount of the supersedeas bond was inadvertently fixed at \$30 less than the amount actually due including interest, etc., is immaterial no objection being made by the opposite party at the time.¹² The bond being accepted, the writ of error granted, and the citation issued, a motion to increase the bond is in the exclusive jurisdiction of the appellate court.¹³

§ 2016. Writ of error as supersedeas in capital cases.

Every such writ of error [i. e., from the Supreme Court to any court of the United States in capital cases¹⁶] shall, during its pendency, operate as a stay of proceedings upon the judgment in respect to which it is sued out.

Part of § 6 act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 570.

§ 2017. — execution postponed until mandate returned—subsequent proceedings.

Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

R. S. § 1040, U. S. Comp. Stat. 1901, p. 724.

⁹Idem.

¹⁰Louisville, etc. Railroad Co. v. Pope, 74 Fed. 1, 20 C. C. A. 253.

¹¹Fuller v. Aylesworth, 75 Fed. 694, 21 C. C. A. 505.

¹²Clarke v. Bank, 131 Fed. 145.

¹³Ibid.

¹⁶Ante, § 59.

The above section was first enacted in 1869.¹⁷ R. S. § 766¹⁸ provides for stay of execution on appeal in habeas corpus applications. There are also provisions respecting the letting to bail in cases on appeal from State or Federal courts.¹⁹ By R. S. § 1003²⁰ writ of error to a State court has the same effect as if the judgment complained of was rendered in a Federal court.

§ 2018. Effect of writ of error to State court.

The writ [of error from the Supreme Court to a State court³] shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

Part of R. S. § 709, U. S. Comp. Stat. 1901, p. 575.

The general question of supersedeas has already been considered.⁴

§ 2019. No suspension of work of commission of Five Civilized Tribes pending appeal to Supreme Court.

In no such case [i. e., in no case in which appeal is allowed from United States courts in Indian Territory direct to United States Supreme Court⁵] shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States.

Part of act July 1, 1898, c. 545, 30 Stat. 571.

§ 2020. Stay on appeal from interlocutory injunction order—additional bond.

The proceedings in other respects in the court below [upon appeal to the circuit court of appeals from its interlocutory order or decree granting or continuing an injunction or appointing a receiver⁶] shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: Provided . . . that the court below may in its discretion require as a condition of the appeal an additional bond.

Part of § 7, act Mar. 3, 1891, c. 517, as amended June 6, 1900, c. 803, 31 Stat. 660, U. S. Comp. Stat. 1901, p. 550, 551.

Under the above provision the granting of a stay is not a matter of right but of discretion;⁹ and when such discretion is not exercised by

¹⁷Act Mar. 3, 1869, c. 142, 15 Stat. 338.

¹⁸Ante, § 1685.

¹⁹See ante, §§ 1546-1548.

²⁰Ante, § 1888.

³Ante, § 38

⁴Ante, § 2012.

⁵Ante, § 51.

⁶Ante, § 78.

⁹In re Haberman Mfg. Co. 147 U. S. 526, 37 L. ed. 266, 13 Sup. Ct. Rep. 527

that court the power of the appellate court is not affected when the latter court has obtained jurisdiction on appeal.¹⁰ Ordinarily the injunction will be suspended in the lower court after final hearing, only in exceptional cases.¹¹ The action of that court continuing or suspending an injunction, being discretionary, cannot be controlled by mandamus.¹²

§ 2021. — bond on interlocutory injunction appeal.

On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

2nd paragraph of rule 13, circuit court of appeals, in force in all except the first circuit.

In the first circuit the rule was amended October 4, 1898 to read as follows:—

"On an appeal from an interlocutory order or decree granting, continuing, refusing or dissolving an injunction, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal."¹⁶ At that time a decree refusing an injunction was appealable.¹⁷ An appeal from an interlocutory injunction order fixing the appeal bond is not reviewable, nor does the appeal affect any proceeding below except as to the injunction unless the court grants a stay.¹⁸

§ 2022. — stay on appeal from final injunction decree.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

93rd Equity rule, promulgated, Jan. 13, 1879.¹

Ordinarily equity decrees are subject to supersedeas just as judgments at

¹⁰Smith v. Vulcan Iron Works, 165 S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. U. S. 525, 41 L. ed. 813, 17 Sup. Ct. 512.
Rep. 407.

¹¹Lalancé, etc. Mfg. Co. v. Habermann Mfg. Co. 54 Fed. 376.

¹²In re Habermann Mfg. Co. 147 U. S. 530, 37 L. ed. 267, 13 Sup. Ct. Rep. 527; see In re Hawkins, 147 U.

Fed. Proc.—101.

¹⁶2nd par. Rule 13. C. C. A. 1st circuit.

¹⁷Ante, § 78.

¹⁸Crown, etc. Co. v. Standard, etc. Co. 136 Fed. 841, 69 C. C. A. 200.

¹See 97 U. S.

law.² But an injunction decree is not stayed by mere grant of appeal with a bond in the form of a supersedeas bond.³ In such cases it is permissible under the above section for the court or judge granting the appeal, to suspend or modify the injunction pending the appeal.⁴ Where, however, such power is not exercised the decree retains its intrinsic force and effect.⁵

§ 2023. Appeal bond in admiralty cases in second and ninth circuits.

When a notice of appeal is served the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety in the sum of \$250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

§ 1 of Admiralty rule II second circuit adopted Oct. 5, 1892, and § 1 of Admiralty rule 2 of the ninth circuit adopted, May 21, 1900.

§ 2024. — bond for supersedeas.

If the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

2nd section of Admiralty Rule II second circuit adopted Oct. 5, 1892 and second section of rule 2, ninth circuit, adopted May 21, 1900.

§ 2025. — exception to sureties and justification.

The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

²Ante, § 2012.

³Knox Co. v. Harshman, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; Leonard v. Land Co. 115 U. S. 465, 29 L. ed. 445, 6 Sup. Ct. Rep. 127; 19 L. ed. 915; New River, etc. Co. v. Seeley, 117 Fed. 982; Interstate, etc. Comm. v. Louisville, etc. R. Co. 101 Fed. 146; Stafford v. King, 90 Fed. 141, 32 C. C. A. 536.

⁴New River Mineral Co. v. Seeley, 117 Fed. 982.

⁵Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 892, 3 Sup. Ct. Rep. 127; Slaughter House Cases, 10 Wall. 273, 19 L. ed. 915; New River, etc. Co. v. Seeley, 117 Fed. 982.

3rd section Admiralty rule II second circuit, adopted October 5, 1892
and 3rd section admiralty rule 2 of the ninth circuit, adopted May 21,
1900.

§ 2026. — writ of inhibition to stay proceedings below.

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.

Rule XII of Admiralty rules circuit court of appeals, second circuit.

§ 2027. Commerce Commissions order not vacated on appeal.

Such appeal [i. e., to the Supreme Court from proceedings by petition to enforce a commerce commission order¹⁰] shall not vacate or suspend the order appealed from.

Part of § 5 act June 29, 1906, c. 3591, 34 Stat. 592, amending earlier law.

¹⁰See ante, § 63, where this provision is given in full.

CHAPTER 61.

DOCKET, MOTIONS, HEARING AND SCOPE OF REVIEW.

- § 2035. No hearing until complete record filed.
- § 2036. Models, exhibits, etc. to be placed in marshal's custody.
- § 2037. —rule in circuit court of appeals.
- § 2038. Disposition in Supreme Court of models, etc., after cases heard.
- § 2039. —rule in circuit court of appeals.
- § 2040. Advancing capital cases to hearing.
- § 2041. Precedence on docket of writs of error to State courts in criminal cases.
- § 2042. —of review of Board of General Appraisers in revenue decisions.
- § 2043. —of commerce cases.
- § 2044. Call and order of docket in Supreme Court—cases to go to foot of docket if neither party ready.
- § 2045. —ten cases called each day.
- § 2046. —criminal cases may be advanced.
- § 2047. —cases once adjudicated advanced on motion.
- § 2048. —advancing cases of general public interest.
- § 2049. —motions to advance what to contain.
- § 2050. —no other changes in docket ordinarily made.
- § 2051. —cases heard together.
- § 2052. —reinstatement of cause.
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- § 2072. Arguments before Supreme Court—printed arguments—when and how received.
- § 2073. —filling printed argument equivalent to personal appearance.
- § 2074. —when printed arguments received if cause argued orally by opposing counsel.
- § 2075. —when brief or argument may be received after argument or submission.
- § 2076. —only one counsel heard when no opposing oral argument.
- § 2077. —opening argument—opening and close.
- § 2078. —only two counsel to a side to be heard.
- § 2079. —two hours for argument unless by special leave.
- § 2080. Oral argument in circuit court of appeals.
- § 2081. Facts tried by jury reviewable only by common law rules.
- § 2082. Scope of review where trial jury waived.
- § 2083. Erroneous ruling of plea of abatement on matter of fact no ground for reversal on error.
- § 2084. Scope of review on error to State courts.
- § 2085. Only objections made below to exhibits, etc., in admiralty and equity, entertainable in Supreme Court.
- § 2086. —rule in circuit courts of appeal.
- § 2087. No new evidence in Supreme Court except in admiralty and prize cases.
- § 2088. How further proof taken in Supreme Court.
- § 2089. New evidence in maritime cases before Supreme Court.
- § 2090. Further proof in circuit courts of appeal.
- § 2091. Use of books in Supreme Court law library how regulated.
- § 2092. Copy of records, motions and briefs to be deposited in law library.
- § 2093. Books of the court to be kept in conference room.
- § 2094. Supreme Court's adjournment day—no argument or brief three days prior thereto.
- § 2095. Appellate proceedings from Porto Rico courts to be in English.
- § 2096. On what papers appeals in admiralty heard—review in part only.
- § 2097. When appellant in admiralty may proceed to hearing, *ex parte*.

§ 2035. No hearing until complete record filed.

No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

Third paragraph Supreme Court rule 8, as revised Dec. term, 1858,¹ and C. C. A. rule 14, in force in all circuits.

A cause will not be heard until a complete record has been filed,² and

¹21 How. vii.

10 L. ed. 246; *Veitch v. Farmers*

²*Keene v. Whittaker*, 13 Pet. 459, Bank, 6 Pet. 776, 8 L. ed. 578.

when not so filed the cause will be remanded.³ But a clerk's certificate which shows that certain parts of the record were omitted from the transcript by the direction of the plaintiff's attorney is sufficient to bar a motion to dismiss the appeal where it does not appear that the omitted parts are necessary to the hearing. In such case the appellee if he thinks the record defective must resort to certiorari or other proper remedy.⁴

§ 2036. Models, exhibits, etc., to be placed in marshal's custody.

Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

First paragraph Supreme Court rule 33, promulgated Nov. 23, 1885.⁵

§ 2037. — rule in circuit court of appeals.

The rule in all the circuit courts of appeal is identical with the foregoing Supreme Court rule except that the time fixed is ten days and not one month.⁶

Author's section.

§ 2038. Disposition in Supreme Court of models, etc., after cases heard.

All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Second paragraph Supreme Court rule 33, promulgated Jan. 7, 1884.

§ 2039. — rule in circuit court of appeals.

The rule in the circuit courts of appeal is the same as that in the

³Estho v. Lear, 7 Pet. 130, 8 L. ed. 633. ⁵115 U. S. 701.

⁴Nashua, etc. Corp v. Boston, etc. Corp, 61 Fed. 237, 9 C. C. A. 468. ⁶Par. 1, C. C. A. Rule, 34 in all except the circuit. Par. 1 C. C. A. Rule, 32, 7th circuit.

Supreme Court except in the seventh circuit, where the change is merely in phraseology.¹⁰

Author's section.

§ 2040. Advancing capital cases to hearing.

All such writs of error [i. e., capital cases in Supreme Court¹¹] shall be advanced to a speedy hearing on motion of either party.

Part of § 6, act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 570.

§ 2041. Precedence on docket of writs of error to State courts in criminal cases.

Cases on writ of error, to revise the judgment of a State court in any criminal cases, shall have precedence on the docket of the Supreme court of all cases to which the government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

R. S. § 710, U. S. Comp. Stat. 1901, p. 576.

It is also provided in R. S. § 949¹⁵ that cases in which a State is party or its revenue laws are enjoined, shall have precedence in all courts of the United States.

§ 2042. — of review of Board of General Appraisers in revenue decisions.

The Supreme Court shall give priority to such cases [i. e., cases in which the decisions of the circuit court as to the holdings of the board of general appraisers in revenue cases are reviewed by the Supreme Court] and may affirm, modify or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Part of § 15, c. 407, act June 10, 1890, 36 Stat. 138, U. S. Comp. Stat. 1901, p. 1934.

§ 2043. — of Commerce Cases.

Appeals in proceedings by petition to enforce orders of the commerce commission other than for the payment of money are given

¹⁰2nd Par. C. C. A. rule 34, except 7th circuit of C. C. A. rule 32 in 7th circuit amended Feb. 10, 1899.

¹¹Ante, § 59.

¹⁵Ante, § 820.

precedence over all except criminal cases by the act of 1906.¹⁸ It also gives the same precedence to suits against the commission to “enjoin, set aside, annul or suspend any order or requirement of the commission,” and to appeals from an “interlocutory order or decree granting or continuing an injunction in any suit.”¹⁹

Author's section.

§ 2044. Call and order of docket in Supreme Court—cases to go to foot of docket if neither party ready.

The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

First paragraph Supreme Court rule 26.¹

When a case is once sent to the foot of the docket it will not be reinstated to the inconvenience of other litigants.²

§ 2045. — ten cases called each day.

Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

Second paragraph Supreme Court rule 26, as amended May 13, 1889.⁵

§ 2046. — criminal cases may be advanced.

Criminal cases may be advanced by leave of the court on motion of either party.

Third paragraph Supreme Court rule 26, promulgated Dec. term, 1866.⁶

The advancing of a criminal case under the above rule is discretionary with the court, and has been refused where it appeared that defendant

¹⁸Ante, § 63.

²Barry v. Mercein, 4 How. 574, 11

¹⁹§ 5 act June 29, 1906, c. 3591, L. ed. 1108.

³⁴Stat. 592. See ante, §§ 1355, 78. ⁵130 U. S. 706.

¹See 3 Pet. xvi; also 21 How. xv. ⁶4 Wall. vii.

was not in jail.⁷ The Revised Statutes give precedence to criminal cases from State courts.⁸

§ 2047. — cases once adjudicated advanced on motion.

Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

Fourth paragraph Supreme Court rule 26.

§ 2048. — advancing cases of general public interest.

Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the Attorney General.

Fifth paragraph Supreme Court rule 26, promulgated Dec. term, 1866.

The above section relates only to revenue cases and cases in which the United States are concerned which also involve or effect some matter of general public interest. These cannot be advanced except in the discretion of the court and on the motion of the attorney-general.¹² Causes of public importance will not be advanced where similar causes are already assigned for the remainder of the term.¹³ Cases arising on municipal ordinances levying taxes are not revenue cases entitled to preference.¹⁴ Motions to advance on the ground that the operations of the government would be embarrassed while the cause remained unsettled should state the facts so that the court may judge as to the sufficiency thereof.¹⁵

§ 2049. — motions to advance what to contain.

All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

Sixth paragraph Supreme Court rule 26, promulgated May 3, 1875.¹⁸

§ 2050. — no other changes in docket ordinarily made.

No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot

⁷Ward v. Maryland, 12 Wall. 164, 20 L. ed. 260.

⁸§ 2041.

¹²Poindexter v. Greenboro, 109 U. S. 65, 27 L. ed. 860, 3 Sup. Ct. Rep. 8.

¹³Barry v. Mercein, 4 How. 574, 11 L. ed. 1108.

¹⁴Davenport v. Davis, 15 Wall 390, 21 L. ed. 96.

¹⁵United States v. Norton, 91 U. S. 558, 23 L. ed. 250.

¹⁸21 Wall. v.

of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

Seventh paragraph Supreme Court rule 26, as revised and corrected Dec. term, 1870.

Causes not presenting questions entitling them to precedence will not be advanced,¹ especially when one of the parties thereto objects.² The fact that a cause apparently has no merit is not ground for its advancement.³

§ 2051. — cases heard together.

Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

Eighth paragraph Supreme Court rule 26, promulgated Dec. term, 1866.⁴

§ 2052. — reinstatement of cause.

If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

Ninth paragraph Supreme Court rule 26, promulgated Jan. 18, 1875.⁵

§ 2053. — cases may be passed only by court's leave.

No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

Tenth paragraph Supreme Court rule 26, promulgated Jan. 18, 1875.⁶

§ 2054. — cases under act of 1889 and 1891 to be advanced and heard.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236,¹² or under section 5 of the

¹Pennsylvania v. Wheeling, etc. Co.
¹¹ How. 528, 13 L. ed. 799.

²Louisiana v. New Orleans, 103
U. S. 521, 26 L. ed. 307.

³Amory v. Amory, 91 U. S. 356,
23 L. ed. 436.

⁶⁴ Wall. vii.

⁹²⁰ Wall. xvii.

¹¹²⁰ Wall. xvii.

¹²Ante, § 59.

act of March 3, 1891, chapter 517,¹³ where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6¹⁴ in regard to motions to dismiss writs of error and appeals.

Thirty-second Supreme Court rule, amended Nov. 28, 1892.

Cases will be advanced under the provisions of the above rule when the only question at issue is the jurisdiction of the court below.¹⁵

§ 2055. — call and order of docket in circuit courts of appeal.

The rules in the circuit courts of appeal as to the call and order of the docket, the assignment of causes for hearing, and the calendar rules, are not uniform in all circuits and the practitioner is referred to rules of the particular circuit as set forth in the appendix.

Author's section.

§ 2056 — precedence given appeals from interlocutory injunction decrees.

The appeal [to the circuit court of appeals from an interlocutory order or decree granting or continuing an injunction or appointing a receiver¹⁸] . . . shall take precedence in the appellate court.

Part of § 7, act Mar. 3, 1891, c. 517, as amended June 6, 1900, c. 803, 31 Stat. 660; U. S. Comp. Stat. 1901, p. 550, 551.

§ 2057. Motion days—no arguments Saturday.

The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that date to the other business of the court. The motion day shall be Monday of each week and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

Sixth paragraph Supreme Court rule 6, promulgated as original rule 33, Feb. term, 1824.¹⁹ A rule in the seventh circuit provides that "The court will not hear arguments on Mondays or Saturdays unless for special cause it shall so order."²⁰

¹³Ante, § 42.

¹⁴Post, §§ 2059, et seq., 146 U. S.

707.

¹⁵Aspen Mining, etc. Co. v. Billings, 150 U. S. 34, 37 L. ed. 988, 14 Sup. Ct. Rep. 4.

¹⁸Ante, § 78.

¹⁹Wheat. iv.

²⁰Clause 7, rule 22, C. C. A. rule for the 1st circuit.

§ 2058. Motions in Supreme Court to be in writing—what to contain.

All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

Paragraph 1 of 6th Supreme Court rule, promulgated as original rule 51, Jan. term, 1838.¹

§ 2059. — time allowed for argument thereof.

One hour on each side shall be allowed to the argument of a motion; and no more, without special leave of the court, granted before the argument begins.

Paragraph 2 of 6th Supreme Court rule, promulgated Dec. 18, 1876.²

§ 2060. — on motion to dismiss, notice to be given adverse party.

No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

Third paragraph 6th Supreme Court rule, promulgated as rule 31, Dec. term, 1867.³

On motion to dismiss for want of jurisdiction the counsel must have reasonable notice, and it is within the court's discretion to determine what notice is reasonable.⁷ Notice of motion to dismiss on stipulation without stating the time of hearing thereon, has been held insufficient and the dismissal set aside and the appeal reinstated.⁸

§ 2061. — submitted on briefs—proof of service.

All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9,¹⁰ must be submitted in the first instance on printed briefs or arguments.^{[a]-[b]} If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court,^[c] at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the

¹12 Pet. viii.

²93 U. S. vii.

³6 Wall. v.

⁷Davidson v. Lanier, 131 U. S.

lxxii., 16 L. ed. 796.

⁸Glenny v. Langdor, 94 U. S. 605,

24 L. ed. 237.

¹⁰Post, § 2063.

mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

Fourth paragraph of 6th Supreme Court rule, promulgated May 6, 1872.¹¹

[a] Hearing and determination.

Oral arguments are not allowed on motion to dismiss appeal or writ of error.¹² The motion papers should contain in themselves so much of the record as to enable the court to act understandingly.¹³ Hence a motion to dismiss which the court cannot pass upon without reference to the transcript will be denied but without prejudice.¹⁴ But on motion of appellant to dismiss his appeal the court has refused to allow correspondence to be filed which is referred to as stating the grounds on which the motion is made.¹⁷

[b] Scope of the hearing.

On a motion to dismiss the court looks to the regularity of the writ and the question of jurisdiction.¹⁸ Other questions must in general await a final hearing.¹⁹ So, the propriety or impropriety of an order granting a supersedeas cannot be considered on such a motion.³ Nor can the court decide whether a decree prior to the decree appealed from was final, or what orders made prior to the decree appealed from can be reviewed, these being matters to be considered when the appeal is heard on its merits.⁴ The court will entertain a motion to dismiss before the term in which in regular order, the record is returnable if the record has been actually brought up and printed.⁶ But such motions will not be decided before the record is

¹¹13 Wall. xi.

¹²Carey v. Houston, etc. Ry. 150 U. S. 179, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹³Waterville v. Van Slyke, 115 U. S. 290, 29 L. ed. 406, 6 Sup. Ct. Rep. 39; Texas, etc. Co. v. Scott, 137 U. S. 436, 34 L. ed. 730, 11 Sup. Ct. Rep. 140; Carey v. Houston, etc. Ry. 150 U. S. 179, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

¹⁴Callan v. Bransford, 139 U. S. 198, 35 L. ed. 144, 11 Sup. Ct. Rep. 519.

¹⁷United States v. Griffith, 141 U.

S. 212, 35 L. ed. 719, 11 Sup. Ct. Rep. 1005.

¹⁸Sparrow v. Strong, 3 Wall. 105, 18 L. ed. 50; Hecker v. Fowler, 1 Black. 95, 17 L. ed. 45; Minor v. Tillotson, 1 How. 288, 11 L. ed. 135.

¹⁹Sparrow v. Strong, 3 Wall. 105, 18 L. ed. 50.

³Hudgins v. Kemp, 18 How. 535, 15 L. ed. 511.

⁴Hill v. Chicago, etc. R. R. 129 U. S. 174, 32 L. ed. 651, 9 Sup. Ct. Rep. 269.

⁶Thomas v. Wooldridge, 23 Wall. 288, 23 L. ed. 135; Ex parte Russell, 13 Wall. 671, 20 L. ed. 632; Clark

printed when there is any question about the facts on which the motion rests.⁷

[c] Service on adverse party.

Omission to accompany notice of motion to dismiss with copy of the brief to be used in support thereof is not ground for postponing hearing where the opposing counsel has filed full arguments on the merits. Otherwise it might be.⁹

§ 2062. — when motions to affirm and dismiss may be united.

There may be united, with a motion to dismiss a writ of error or an appeal a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Fifth paragraph Supreme Court rule 6, promulgated May 8, 1876.¹²

Where there is sufficient color of right for a motion to dismiss the court will entertain a motion to affirm.¹³ There must, however, be a color of right to dismissal;¹⁴ and when there is no color of right the motion to affirm will not be considered.¹⁷ There being sufficient color for the motion to dismiss to allow the court to entertain a motion to affirm, the court will grant the latter where the appeal is taken only for delay,¹⁸ or where the Federal question is clearly frivolous.¹⁹

§ 2063. Motion to docket and dismiss.

. . . If the plaintiff in error or appellant shall fail to comply with this rule [i. e., as to docketing the case and filing the record] the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time

v. Hancock, 94 U. S. 493, 24 L. ed. 146.

⁷National Bank v. Insurance Co. 100 U. S. 43, 25 L. ed. 547; Water-ville v. Van Slyke, 115 U. S. 290, 29 L. ed. 406, 6 Sup. Ct. Rep. 39.

⁹Thomas v. Wooldridge, 23 Wall. 288, 23 L. ed. 135.

¹²91 U. S. vii.

¹³The Alaska, 130 U. S. 208, 32 L. ed. 923, 9 Sup. Ct. Rep. 461; McCormick, etc. Co. v. Walthers, 134 U. S. 45, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; Central Trust Co. v. Grant, etc. Co. 135 U. S. 225, 34 L. ed. 97, 10 Sup. Ct. Rep. 736; Kauffman v. Wootters, 138 U. S. 287, 34 L. ed.

962, 11 Sup. Ct. Rep. 298; Whitney v. Cook, 99 U. S. 607, 25 L. ed. 446.

¹⁴Hinckley v. Morton, 103 U. S. 765, 26 L. ed. 458.

¹⁷School District v. Hall, 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; Davies v. Corbin, 113 U. S. 689, 28 L. ed. 1149, 5 Sup. Ct. Rep. 696; Chanute City v. Trader, 132 U. S. 213, 33 L. ed. 345, 10 Sup. Ct. Rep. 67.

¹⁸The S. C. Tryon, 105 U. S. 270, 26 L. ed. 1026.

¹⁹Chanute City v. Trader, 132 U. S. 212, 33 L. ed. 345, 10 Sup. Ct. Rep. 67.

or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

Part of paragraph 1, Supreme Court rule 6.

The whole of rule 9 will be found in a preceeding section.¹ While the above provision does not in terms provide for docketing and dismissal by motion that is the procedure contemplated in such a case by paragraph 4 of rule 6.²

§ 2064. Motions in circuit courts of appeal.

The rules in force in the various circuit courts of appeal for the different circuits, as to motions, will be found in the appendix.

Author's section.

§ 2065. Motions in admiralty causes in second and ninth circuits.

All motions shall be made upon at least four days' notice.

Admiralty rule XI., circuit court of appeals for the second circuit, adopted May 20, 1892, and admiralty rule 11, for the ninth circuit, adopted May 21, 1900.

§ 2066. Briefs in Supreme Court—time of filing—appellant's brief.

The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

Claim 1 of 21st Supreme Court rule.³

If no brief is filed by the plaintiff's counsel the appeal may be dismissed;⁴ or the judgment affirmed.¹⁰ Where no brief is filed it is inferred that the exceptions taken have been abandoned.¹¹ Language in briefs as well as in oral argument concerning opposing client must be respectful.¹²

¹Ante, § 1973.

²Ante, § 2061.

³See 14 Wall. xi.

⁴Portland Cement Co. v. United States 15 Wall. 1, 21 L. ed. 113.

¹⁰Ryan v. Koch, 17 Wall. 19, 21 L. ed. 616.

¹¹Duvall v. United States, 154 U. S. 548, 18 L. ed. 252, 14 Sup. Ct. Rep. 1162.

¹²Kneeland v. Loan, etc. Co. 138 U. S. 513, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426.

and a brief containing impertinent and scandalous allegations bearing reproachfully on the character of individuals,¹³ or on the trial court¹⁴ will be stricken from the files. Where the plaintiff in error makes no appearance, a motion at next session to permit a printed brief or argument in his behalf comes too late.¹⁵

§ 2067. — what to contain.

This brief [i. e. appellant's] shall contain, in the order here stated:

I. Statement.—A concise abstract, or statement of the case, presenting succinctly the question involved and the manner in which they are raised.

II. Errors assigned.—A specification of the error relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

III. Points of law or fact.—A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

Second paragraph Supreme Court rule 21.¹⁸

§ 2068. — brief of appellee or defendant in error.

The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or

¹³Green v. Elbert, 137 U. S. 624, 34 L. ed. 792, 11 Sup. Ct. Rep. 188. ¹⁵Watterson v. Payne, 154 U. S. 534, 15 L. ed. 899, 14 Sup. Ct. Rep.

¹⁴Smith v. Simpson, 140 Fed. 712, 1157, 1214.
(C. C. A.)

¹⁸See 14 Wall. xi.

appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

Third paragraph Supreme Court rule 21.²⁰

§ 2069. — errors not specified to be disregarded.

When there is no assignment of errors, as required by section 997 of the Revised Statutes,³ counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

Fourth paragraph Supreme Court rule 21.⁴

The thirty-fifth Supreme Court rule provides that in cases of direct appeal the assignment of errors must be filed with the lower court on petition for the writ or appeal.⁵ The failure to return the assignments of errors with the writ is however, no ground of dismissal for want of jurisdiction. Ordinarily if the specifications are filed as provided in the above section it is sufficient.⁶ But where there is no assignment, no specifications of errors, and no plain error, the writ will be dismissed.⁷

§ 2070. — cases dismissed where parties in default.

When, according to this rule,⁹ a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

Paragraph 5 of Supreme Court rule 21, promulgated Nov. 16, 1872.¹⁰

Under this section the appeal must be dismissed where there is no brief filed and no assignment of errors as required by the rules.¹¹

§ 2071. Briefs in causes before circuit courts of appeal.

The rules of the circuit courts of appeal as originally adopted respecting briefs, their form and contents and the procedure thereon have been largely changed by the courts of the different circuits. These rules as now in force in the different circuits will be found in

²⁰See 14 Wall. xii.

³Ante, § 1953.

⁴See 21 Wall. xii.

⁵Ante, § 1930.

⁶School District v. Hall, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417.

⁷Rowe v. Phelps, 152 U. S. 87, 38

Fed. Proc.—102.

L. ed. 365, 14 Sup. Ct. Rep. 632. See generally, ante, § 1930 and notes.

⁹Ante, §§ 2066–2069.

¹⁰12 Wall. xii.

¹¹Benites v. Hampton, 123 U. S. 521, 31 L. ed. 260, 8 Sup. Ct. Rep. 254.

the appendix. In the second circuit the 15th admiralty rule prescribes the form of briefs in admiralty causes.

Author's section.

The necessity of conforming strictly to the rules prescribed as to briefs has been frequently stated.¹⁴

§ 2072. Arguments before Supreme Court—printed arguments—when and how received.

In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

Clause 1 of 20th Supreme Court rule as amended October term, 1887.¹⁵

Where, under a stipulation to submit a cause under the above rule, the plaintiff in error fails to file his argument, but the defendant files his in the proper time, the court will take the case as submitted.¹⁷ Stipulations for submitting cases cannot be withdrawn except by consent or leave of court upon cause shown.¹⁸

§ 2073. — filing printed argument equivalent to personal appearance.

When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

Second paragraph Supreme Court rule 20, as revised and corrected Dec. term, 1888.²⁰

§ 2074. — when printed arguments received if cause argued orally by opposing counsel.

When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed

¹⁴Walton v. Mining Co. 123 Fed. S. 218, 28 L. ed. 125, 3 Sup. Ct. Rep. 211, 60 C. C. A. 155. 639.

¹⁶123 U. S. 759.

¹⁸Idem.

¹⁷Aurrecoechea v. Bangs, 110 U. 2021 How. xii.

before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

Third paragraph Supreme Court rule 20, as revised and corrected Dec. term, 1858.³

§ 2075. — when brief or argument may be received after argument or submission.

No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

Fourth paragraph Supreme Court rule 20, promulgated Dec. 11, 1874.⁴

Where a case has been submitted but it appears that the State statutes are not set out in the brief as required by the 21st Supreme Court rule,⁵ the submission will be set aside.⁶

§ 2076. — only one counsel heard when no opposing oral argument.

When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

Sixth paragraph of 21st Supreme Court rule, promulgated Dec. 11, 1893.⁸

§ 2077. — opening argument—opening and close.

The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeal, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

Clause 1 of 22nd Supreme Court rule, promulgated Dec. term, 1858.¹⁰

§ 2078. — only two counsel to a side to be heard.

Only two counsel will be heard for each party on the argument of a case.

Clause 2 of Supreme Court rule 22, promulgated as original rule 23, Feb. term, 1812.¹³

This rule has been dispensed with in important cases.¹⁴ Where the

³21 How. xii.

⁴20 Wall. xvi.

⁵Ante, § 2067.

⁶School District v. Insurance Co.

101 U. S. 472, 25 L. ed. 868.

⁸150 U. S. 713.

¹⁰21 How. xii.

¹³21 Wheat. xviii.

¹⁴McCulloch v. Maryland, 4 Wheat.

321 note. 4 L. ed. 580.

United States is a party and is represented by the attorney general or assistant or special counsel it has been ruled that no counsel will be heard in opposition on behalf of any other department of the government.¹⁵

§ 2079. — two hours for argument unless by special leave.

Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

Third clause Supreme Court rule 22, as amended Nov. 16, 1872.¹⁷

§ 2080. Oral argument in circuit court of appeals.

In all the circuit courts of appeal the rule is exactly the same as in the Supreme Court¹⁹ as to opening and close and number of counsel who may argue.²⁰ The rule as to time for argument is the same in all circuits except the second, fifth and ninth.¹ In the ninth the rule is one hour instead of two. In the second^[a] and fifth^[b] circuits the rule has been changed. In the seventh an additional provision restricting the reading from briefs is added.^[c]

Author's section.

[a] Time allowed in second circuit.

"Upon writs of error, and appeals in customs cases and appeals from orders granting or refusing a preliminary injunction, one hour on each side; and in other cases two hours will be allowed for the argument, and no more, without special leave of the court granted before argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided always that a fair opening of the case shall be made by the party having the opening and closing arguments."³

[b] — in fifth circuit.

"One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff

¹⁵The Gray Jacket 5 Wall. 370, 18 L. ed. 646.

¹⁷14 Wall. xi.

¹⁸14 Ante, §§ 2077, 2078.

²⁰Clauses, 2 C. C. A. Rule 25.

¹Clause 3, C. C. A. Rule 25.

³3rd clause C. C. A. Rule 25, 2nd circuit as amended March 9, 1897, 90 Fed. lxxv.

in error or appellant to reply. No more time will be allowed for argument without special leave of the court."⁴

[c] Reading at length from briefs forbidden in 7th circuit.

"Reading at length from briefs or reported cases shall not be indulged."⁶

§ 2081. Facts tried by jury reviewable only by common law rules.

No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.^{[a]-[c]}

Part of 7th amendment United States Constitution.

[a] Scope of amendment.

The constitutional amendment of which the above section is a part is limited to rights and remedies legal in their nature,⁹ and the phrase "common law" is used in contradistinction to equity and admiralty law.¹⁰ Hence jury trial is not a matter of right in equity causes,¹¹ and depends upon the discretion of the court.¹² So on appeal in equity the findings of the jury are not conclusive but are influential.¹³ If satisfactory the practice is to make them the foundation for a decree,¹⁴ and they will not be set aside unless clearly erroneous.¹⁵ An appeal in equity must be decided on the whole case, including pleading evidence and verdict.¹⁶ The above provision applies to facts tried by jury in a State court as well as those tried in the lower Federal courts.¹⁷

[b] Review of facts at common law.

The only modes known to the common law by which facts tried by a jury can be re-examined are the granting of a new trial by the lower court, and the award of a new trial by the appellate court for some error of law.¹⁸ The appellate court cannot therefore on error look into the questions of fact or examine conflicting evidence to ascertain whether the jury was

⁴3rd clause C. C. A. Rule 25, 5th circuit as amended Feb. 27, 1894.

⁶4th clause C. C. A. Rule 25, 7th circuit adopted May 24, 1893.

⁹Shields v. Thomas, 18 How. 262, 15 L. ed. 372.

¹⁰Parsons v. Bedford, 3 Pet. 446, 7 L. ed. 737.

¹¹Barton v. Barbour, 104 U. S. 133, 26 L. ed. 676; Buford v. Holley, 28 Fed. 681.

¹²Ely v. Monson, etc. Co. 4 Fish. Pat. Cas. 64, Fed. Cas. No. 4,431.

¹³Garsed v. Beall, 92 U. S. 684, 23 L. ed. 686; see also United States v. Clark, 200 U. S. 601, 50 L. ed. 613, 26 Sup. Ct. Rep. 340.

¹⁴Garsed v. Beall, 92 U. S. 684, 23 L. ed. 686.

¹⁵Barton Bros v. Texas P. Co. 136 Fed. 355, 69 C. C. A. 181.

¹⁶Buckingham v. McLean, 13 How. 150, 14 L. ed. 90; Johnson v. Harmon, 94 U. S. 371, 24 L. ed. 271; Watt v. Stark, 101 U. S. 250, 25 L. ed. 827.

¹⁷The Justices v. Murray, 9 Wall. 279, 19 L. ed. 661.

¹⁸Hepburn v. Dubois, 12 Pet. 376, 9 L. ed. 1123; Barreda v. Silsbee, 21 How. 167, 16 L. ed. 93; The Justices v. Murray, 9 Wall. 278, 19 L. ed. 661.

justified in finding as it did.²⁰ But it may look and see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict.¹

[c] Rulings on motion for new trial not reviewable.

Decisions and rulings on motion for a new trial are not reviewable in the appellate court.² Hence the refusal to grant a new trial is not reviewable on an assignment of errors.³

§ 2082. Scope of review where trial jury waived.

When an issue of fact in any civil cause in a circuit court^{[a]-[b]} is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine,^[c] the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court^[d] [and now in circuit court of appeals]⁴ upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.^[e]

R. S. § 700, U. S. Comp. Stat. 1901, p. 570.

[a] Purpose and scope of section.

Prior to an enactment of 1865⁷ from which the above section was derived, the Supreme Court held that when a case is submitted to a judge to find facts without the intervention of a jury, he acted as referee with consent of the parties and no bill of exceptions would lie to his reception or rejection of evidence nor to his judgment on the law.⁸ By that act however, on the waiver of jury, and the trial of the cause by the court, the parties were allowed a review of the rulings of the court, when properly excepted to, and also a review of the judgment upon the question whether the facts specially found were sufficient.⁹ This statute is the only one providing for review, in the Supreme Court, of cases where an issue of

²⁰Express Co. v. Ware, 20 Wall. 545, 22 L. ed. 422; New York, etc. Ry. v. Estill, 147 U. S. 617, 37 L. ed. 305, 13 Sup. Ct. Rep. 444.

¹Lancaster v. Collins, 115 U. S. 225, 29 L. ed. 373, 6 Sup. Ct. Rep. 33; see Bank, etc. of North America v. Cooper, 137 U. S. 474, 34 L. ed. 760, 11 Sup. Ct. Rep. 160.

²Illinois, etc. R. Co. v. Coughlin, 145 Fed. 37, (C. C. A.); Meyers v. Kessler, 142 Fed. 730, (C. C. A.); United Engineering Co. v. Broadnax, 136 Fed. 351, 69 C. C. A. 177; Southern Pac. Co. v. Maloney, 136 Fed. 171, 69 C. C. A. 83; Clement v. Wilson, 135 Fed. 749, 68 C. C. A. 387; Graves

v. Sanders, 125 Fed. 690, 60 C. C. A. 422.

³Tacoma Ry. etc. Co. v. Geiger, 145 Fed. 504, (C. C. A.); Newport News, etc. Co. v. Yount, 136 Fed. 589, 69 C. C. A. 363, and cases cited.

⁴See ante, § 1890.

⁵Ante, § 914.

⁷Act Mar. 3, 1865, c. 86, 13 Stat. 501.

⁸Weems v. George, 13 How. 190, 14 L. ed. 108; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321.

⁹Martinton v. Fairbanks, 112 U. S. 676, 28 L. ed. 862, 5 Sup. Ct. Rep.

fact has been tried in the circuit court other than by jury.¹⁰ An agreement to refer an action at law to a special master under the provisions of a State statute is not a trial by the court, and waiver of jury, within the meaning of this section,¹¹ nor is the case of an order of reference by oral consent,¹² nor is a request by each party for instructions to the jury to render a verdict in his favor equivalent to a trial by the court and a waiver of jury.¹³ Where the facts are found by a State court, and the case is brought on a writ of error to the Supreme Court, it is well established that those facts cannot be reviewed.¹⁴

[b] To what court applicable.

The provisions of this section apply only to circuit courts,¹⁷ and hence when a jury trial is waived in the district court the findings of that court while binding on the parties,¹⁸ cannot be reviewed on appeal.¹⁹

[c] Issues of fact determined without intervention of jury.

The provision referred to in the above section regarding the determining of issues of fact without the intervention of a jury is set forth in a previous section.⁴ It must be strictly complied with in all respects.⁵ Hence where there has been no written stipulation as to the waiver of a jury as required thereby, the provisions of the above section do not apply;⁶ and in such case the appellate court cannot notice facts found by the lower court for any purpose, nor consider the exceptions there taken, but may determine only whether the declaration is sufficient to support the judgment.⁷

321; *Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395; *Flanders v. Tweed*, 9 Wall. 425, 19 L. ed. 678.

¹⁰*Boogher v. New York Life Ins. Co.* 103 U. S. 96, 26 L. ed. 310.

¹¹*Shipman v. Ohio, etc. Exch.* 70 Fed. 652, 17 C. C. A. 313; *Boogher v. New York, etc. Ins. Co.* 103 U. S. 90, 26 L. ed. 310.

¹²*Dietz v. Lymer*, 63 Fed. 758, 11 C. C. A. 410.

¹³*Beuttell v. Magone*, 157 U. S. 157, 39 L. ed. 656, 15 Sup. Ct. Rep. 566.

¹⁴*Clipper Min. Co. v. Land Co.* 194 U. S. 222, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; *River Bridge Co. v. Kansas, etc. Ry.* 92 U. S. 315, 23 L. ed. 516; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Hedrick v. Atchison, etc. R. R.* 167 U. S. 677, 42 L. ed. 322, 17 Sup. Ct. Rep. 922.

¹⁷*See Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91; *Wear v. Mayer*, 6 Fed. 658, 2 McCrary, 172; *Lyons v. Lyons, Nat. Bank*, 8 Fed. 369, 19 Blackf. 279.

¹⁸*See Kearney v. Case*, 12 Wall. 275, 20 L. ed. 395.

¹⁹*Rogers v. United States*, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91.

⁴*Ante*, § 914.

⁵*Flanders v. Tweed*, 9 Wall. 429, 19 L. ed. 678.

⁶*Bond v. Dustin*, 112 U. S. 607, 28 L. ed. 836, 5 Sup. Ct. Rep. 296; *Rush v. Newman*, 58 Fed. 160, 7 C. C. A. 136; see also *City v. Schmidt*, 123 Fed. 1, 59 C. C. A. 159.

⁷*Boogher v. New York, etc. Ins. Co.* 103 U. S. 96, 26 L. ed. 310; *Bond v. Dustin*, 112 U. S. 606, 28 L. ed. 835, 5 Sup. Ct. Rep. 296; *Paine v. Central, etc. R. R.* 118 U. S. 158, 30 L. ed. 195, 6 Sup. Ct. Rep. 1022; *Shipman v. Straitsville Min. Co.* 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 888; *Spalding v. Manasse*,

[d] Rulings of court in progress of trial reviewable.

Under the section a bill of exceptions may be used to bring up the rulings of the court in the progress of the trial. Such bill of exceptions cannot, however, be used to bring up the whole of the testimony for review, any more than in a trial by jury.¹⁰ On a general finding only such rulings of the court as are excepted to, during the progress of the trial, can be reviewed,¹¹ and the general finding itself or the conclusions in such general findings are not rulings of the court in the progress of the trial, and hence cannot be reviewed.¹²

[e] Findings—general and special—questions reviewable.

A finding under the above section may be either general or special,¹⁵ but it cannot be both.¹⁶ Whether it shall be general or special rests with the discretion of the court.¹⁷ Hence the request for special findings may be denied.¹⁸ Findings both general and special have the same effect as a verdict of a jury.¹⁹ Hence a general finding is conclusive upon all matters of fact precisely as such a verdict would be.²⁰ The appellate court on error can review nothing except the rulings of the court below properly

131 U. S. 66, 33 L. ed. 86, 9 Sup. Ct. Rep. 649; Dundee Mortgage Co. v. Hughes, 124 U. S. 160, 31 L. ed. 360, 8 Sup. Ct. Rep. 377.

¹⁰Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; City of Key West v. Baer, 66 Fed. 441, 13 C. C. A. 572.

¹¹Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 864, 5 Sup. Ct. Rep. 321; Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; Insurance Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; United States, etc. Co. v. Board of Commissioners, 145 Fed. 144, (C. C. A.)

¹²Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 864, 5 Sup. Ct. Rep. 321; Cooper v. Omohundro, 19 Wall. 65, 22 L. ed. 47.

¹⁵British Queen Min. Co. v. Baker, etc. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523; Wesson v. Saline Co. 73 Fed. 917, 20 C. C. A. 227; Austin v. Hamilton Co. 76 Fed. 208, 22 C. C. A. 128; Daube v. Philadelphia, etc. Co. 77 Fed. 713, 23 C. C. A. 420.

¹⁶Corliss v. Pulaski Co. 116 Fed. 291, 53 C. C. A. 567; Wright v. Bragg, 96 Fed. 731, 37 C. C. A. 574.

¹⁷Mercantile, etc. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Dirst v. Morris, 14 Wall. 484, 20 L. ed. 722; Aetna, etc. Ins. Co. v. Board of Comrs. of Hamilton Co. 79 Fed. 575, 25 C. C. A. 94; Distilling, etc. Co. v. Gotts-

chalk Co. 66 Fed. 609, 13 C. C. A. 618; Key West v. Baer, 66 Fed. 444, 13 C. C. A. 572; Marye v. Strouse, 5 Fed. 494.

¹⁸Paul v. Delaware, etc. R. R. Co. 130 Fed. 957.

¹⁹York v. Washburn, 129 Fed. 566, 64 C. C. A. 132; Norris v. Jackson, 9 Wall. 125, 19 L. ed. 608; Bassett v. United States, 9 Wall. 38, 19 L. ed. 548; Miller v. Brooklyn Ins. Co. 12 Wall. 301, 20 L. ed. 402; Tyng v. Grinnell, 92 U. S. 473, 23 L. ed. 735; Boardman v. Toffey, 117 U. S. 272, 29 L. ed. 898, 6 Sup. Ct. Rep. 734; The Abbotsford, 98 U. S. 443, 25 L. ed. 168; Reed v. Stapp, 52 Fed. 641, 3 C. C. A. 244; King v. Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L.R.A. 708.

²⁰Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 864, 5 Sup. Ct. Rep. 321; United States v. American Bonding Co. 89 Fed. 925, 32 C. C. A. 420; Insurance Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Woodbury v. Shawneetown, 74 Fed. 205, 20 C. C. A. 400; Rhodes v. United States Nat. Bank, 66 Fed. 512, 13 C. C. A. 612, 34 L.R.A. 742; British, etc. Min. Co. v. Baker, etc. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523; Evans v. Kister, 92 Fed. 832, 35 C. C. A. 28.

excepted to,¹ and errors apparent on the face of the record.² It is established, however, that a motion to instruct the jury that the evidence introduced is not sufficient to warrant a verdict for the plaintiff, presents a question of law and hence its refusal may be excepted to.³ So also on a trial by the court without a jury there is the same right to challenge the legal sufficiency of the evidence, and hence to that extent, the evidence may be considered on error.⁴ The question of legal sufficiency in such a case may be raised in the trial court, on motion for judgment, a request for a declaration of law, or any other action which fairly presents that issue for determination before the trial ends.⁵

Where the findings are special the appellate court may review the questions raised by the exceptions properly taken, and the sufficiency of the facts found to support the judgment.⁶ The provision of the trial judge in writing, setting forth his opinions, does not become a special finding by being copied into the judgment entry.⁹

§ 2083. Erroneous ruling of plea of abatement on matter of fact no ground for reversal on error.

There shall be no reversal in the Supreme Court or in a circuit

¹Insurance Co. v. Folsom, 18 Wall. 248, 21 L. ed. 827; Wilson v. Merchants, etc. Co. 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; St. Louis v. Western, etc. Tel. Co. 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct. Rep. 608; Grayson v. Lynch, 163 U. S. 468, 41 L. ed. 231, 16 Sup. Ct. Rep. 1064; Santa Anna v. Frank, 113 U. S. 339, 28 L. ed. 978, 5 Sup. Ct. Rep. 536; Mercantile Ins. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Dirst v. Morris, 14 Wall. 484, 20 L. ed. 722; Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678; Dirsh v. Morris, 14 Wall. 484, 20 L. ed. 722; City of Key West v. Baer, 66 Fed. 440, 13 C. C. A. 572; National, etc. Co. v. O'Leary, 126 Fed. 363.

²St. Louis v. Western, etc. Tel. Co. 166 U. S. 388, 41 L. ed. 1044, 17 Sup. Ct. Rep. 608; Bethel v. Mathews, 13 Wall. 1, 20 L. ed. 556; Bassett v. United States, 9 Wall. 38, 19 L. ed. 548; Campbell, etc. Commission Co. v. Trammell, 74 Fed. 917, 21 C. C. A. 177; Corliss v. Pulaski Co. 116 Fed. 291, 53 C. C. A. 567.

³United States, etc. Co. v. Board of Commissioners, 145 Fed. 151, (C. C. A.) and cases cited; Insurance Co. v. Folsom, 18 Wall. 251, 21 L. ed. 834; Schuchardt v. Allens, 1

Wall. 370, 17 L. ed. 646; Parks v. Ross, 11 How. 362, 13 L. ed. 730; Bliven v. Screw Co. 23 How. 433, 16 L. ed. 514.

⁴Paul v. Delaware, etc. R. Co. 130 Fed. 956, reviewing authorities; Worlds, etc. Exposition v. Republic, 96 Fed. 689, 38 C. C. A. 483; Martinton v. Fairbanks, 112 U. S. 672, 28 L. ed. 863, 5 Sup. Ct. Rep. 322; see also, Insurance Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Barnard v. Randle, 110 Fed. 909, 49 C. C. A. 177; and see Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L.R.A. 569, where peremptory instructions requested by each party, one of which requests was allowed, was held to amount to a general finding by the court.

⁵United States, etc. v. Board of Commissioners, 145 Fed. 151, (C. C. A.), and cases cited.

⁶Dickinson v. Bank, 16 Wall. 250, 21 L. ed. 278; Mercantile, etc. Co. v. Folsom, 18 Wall. 237, 21 L. ed. 827; Saltonstall v. Birtwell, 150 U. S. 419, 37 L. ed. 1128, 14 Sup. Ct. Rep. 169; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 102.

⁹York v. Washburn, 129 Fed. 564, 64 C. C. A. 132.

court [and now in circuit court of appeals¹³] upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

R. S. § 1011, U. S. Comp. Stat. 1901, p. 715.

The above section has never been, and should not be, construed as forbidding the review of a decision of any question of the jurisdiction of the court below to render judgment, although depending on the service of the writ.¹⁴ The plea of another action pending is a plea in abatement within the meaning of this section and judgment thereon is not subject to revision in the Supreme Court.¹⁵ It is established that the findings, whether by the court or jury and whether general or special, are conclusive of the facts so found.¹⁶ The sufficiency of the facts however, to support the judgment, is a question of law and may be considered if the proper steps are taken.¹⁷ This section applies to the circuit court of appeals as well as to the Supreme Court.¹⁸

§ 2084. Scope of review on error to State courts.

State court judgments and decrees are only reviewable by writ of error, so that the review is limited to questions of law.¹ It has, moreover, long been settled law that the Supreme Court will only review such Federal question as has been properly raised and decided in the State court. The latter's decision on all other matters, both of law and fact, will be accepted by the Supreme Court as conclusive upon it.² The scope of review on error to Territorial courts has already been considered.^{2½}

Author's section.

§ 2085. Only objections made below to exhibits, etc., in admiralty and equity, entertainable in Supreme Court.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the

¹³See ante, § 1890.

¹⁴*Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

¹⁵*Stephens v. Monongahela Bank*, 111 U. S. 198, 29 L. ed. 399, 4 Sup. Ct. Rep. 336, 337; *Pequignot v. Pennsylvania*, etc. R. Co. 16 How. 104, 14 L. ed. 863.

¹⁶*Norris v. Jackson*, 9 Wall. 125, 19 L. ed. 608; *Paul v. Delaware*, etc.

R. R. 130 Fed. 956, reviewing authorities.

¹⁷See ante, § 2082 [e].

¹⁸*United States, etc. Co. v. Board of Commissioners*, 145 Fed. 150, (C. C. A.); *Paul v. Delaware, etc. R. R.* 130 Fed. 951; *Hall v. Houghton, etc. Co.* 60 Fed. 350, 8 C. C. A. 661.

¹Ante, § 38.

²Ante, § 12.[h].

^{2½}Ante § 1961,[b].

court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Supreme Court rule 13, as revised and corrected Dec. term, 1858.³

Objections cannot be taken for the first time in the appellate court, to matters appearing on the record as sent up, such as the reports of a master in chancery,⁴ or the report of a referee,⁵ or deeds, depositions or exhibits.⁶ Where the objection does not appear on the record it is deemed to have been waived.⁷ The Supreme Court will take no notice of a stipulation of counsel as to the evidence bearing on a finding of the court.⁸

§ 2086. — rule in circuit courts of appeal.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Twelfth rule of circuit courts of appeal, in force in all circuits.

Exceptions to the ruling of the trial court as to admissibility of evidence are necessary in order that the ruling be considered by the appellate court.⁹

§ 2087. No new evidence in Supreme Court except in admiralty and prize cases.

And on such appeal no new evidence shall be received in the Supreme Court, except in admiralty and prize causes.

Part of R. S. § 698, U. S. Comp. Stat. 1901, p. 568.

The first portion of R. S. § 698 is contained in an earlier chapter.¹³ By the act of 1891¹⁴ the appellate jurisdiction in admiralty causes is now vested entirely in the circuit court of appeals, the Supreme Court having jurisdiction over direct appeals in prize cases only. The latter court, while it had appellate jurisdiction in admiralty causes, used its discretion in regard to the authorization of further proofs on appeal.¹⁵ And the

³21 How. x.

⁴Canal Co. v. Gordon, 6 Wall. 569, 18 L. ed. 894.

⁵See Lumber Co. v. Buchtel, 101 U. S. 633, 25 L. ed. 1072.

⁶Mitchell v. United States, 9 Pet. 736, 9 L. ed. 292.

⁷The Pizarro, 2 Wheat, 227, 4 L. ed. 226; Hinde v. Longworth, 11 Wheat, 206, 6 L. ed. 457; Brockett v. Brockett, 3 How. 691, 11 L. ed. 786; San Pedro Canon, etc. Co. v.

United States, 146 U. S. 120, 36 L. ed. 911, 13 Sup. Ct. Rep. 94.

⁸Fort Worth City Co. v. Smith, etc. Co. 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339.

⁹National Bank v. Schufelt, 145 Fed. 509, (C. C. A.) and cases cited.

¹³Ante, § 1959.

¹⁴Ante, §§ 42, 77.

¹⁵The Philadelphian, 60 Fed. 428, 9 C. C. A. 54.

general rule which it adopted that the appellate tribunal ought to be "very cautious in admitting any new matters,"¹⁶ and that some excuse satisfactory to the court ought to be shown for not taking the proofs in the court below,¹⁷ has been followed by the circuit court of appeals.¹⁸ Additional testimony has been admitted on a showing that the claimant was too ill to instruct proctor how to meet opponent's case at trial.¹⁹

§ 2088. How further proof taken in Supreme Court.

In all cases where further proof is ordered by the court, the deposition which may be taken shall be by a commission to be issued from this court, or from any circuit court of the United States.

Clause 1 of rule 12 of Supreme Court as revised and corrected Dec. term, 1858.¹

§ 2089. New evidence in maritime cases before Supreme Court.

In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

Second clause Supreme Court rule 12, promulgated as rule 32, Feb. term, 1817,² revised Dec. term, 1858.³

While the appellate jurisdiction of the Supreme Court over admiralty and maritime causes, is abolished except in cases of prize,⁴ the former practice of that court is followed by the circuit court of appeals whenever practicable.⁵ Hence new evidence in admiralty appeals to the circuit court of appeals is not taken *de bene esse*, but by commission under the above section.⁶ Such commission does not issue of course but only when

¹⁶Coffin v. Jenkins, 3 Story, 108, Fed. Cas. No. 2,948.

¹⁷The Mabey, 10 Wall. 420, 19 L. ed. 963; The Juniata, 91 U. S. 367, 23 L. ed. 208; see The Western Metropolis, 12 Wall. 389, 20 L. ed. 394.

¹⁸The Venezuela, 52 Fed. 875, 3 C. C. A. 319; Red. River Line v. Cheatham, 60 Fed. 520, 9 C. C. A. 124.

¹⁹The Glide, 68 Fed. 720, 15 C. C. A. 627.

¹²¹How. ix.

²²Wheat. vii.

³²¹How. x.

⁴The Beeche Dene, 55 Fed. 528, 5 C. C. A. 208.

⁵Ante, § 1887.

⁶The Beeche Dene, 55 Fed. 528, 5 C. C. A. 208.

it appears that the testimony is material and a good excuse for not offering it at the trial court is given.⁷

§ 2090. Further proof in circuit courts of appeal.

Since 1891 the appellate admiralty jurisdiction has been vested in the circuit courts of appeal.¹⁰ In the first, second and sixth circuits special rules have been promulgated.^[a] The practice as it formerly prevailed in the Supreme Court has been followed in the different circuits with more or less fidelity and the practitioner must advise himself of any local peculiarities in any particular circuit.

Author's section.

[a] First circuit—what further proof to include.

"Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation will not ordinarily be held cumulative in cases of collision or other maritime tort."¹¹

[b]—how taken.

"Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse* or by an examiner appointed by any district or circuit judge, or selected by the parties, or upon interrogatories or commissions as provided in rule 44 of the circuit courts of this district, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafter until the cause has been postponed for the next term or session."¹²

[c]—objections to be filed—hearing—costs thereof.

"Objections to further proof shall be filed with the magistrate and returned with the evidence, within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter statement and brief. The objections and counter statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider

⁷The Beeche Dene, 55 Fed. 528, 5 C. C. A. 208; see also The Glide, 68 Fed. 720, 15 C. C. A. 627.

¹⁰Ante, § 77.

¹¹Par. 7 C. C. A. Rule 14, 1st circuit promulgated Feb. 23, 1894.

¹²Par. 8 C. C. A. Rule 4, 1st circuit promulgated Feb. 23, 1894.

the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed, evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof."¹⁵

[d] — application for or objections to the taking allowed in advance.

"Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed."¹⁶

[e] Second and ninth circuits—allowance of further proof etc.

The following rule is in force in the second circuit: "Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days notice to be adverse party."¹⁷ A similar rule obtains in the ninth circuit also: "Upon sufficient cause shown, this court or any judge thereof, may allow either appellant or appellee to make new obligations or pray different relief, or interpose a new defense or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal in this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days notice to the adverse party or his attorney of record."¹⁸

[f] — new pleadings—new testimony.

In the second and ninth circuits the rule is that: "If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

"If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing."²⁰

[g] — new testimony—how taken.

In the 2nd circuit the rule provides that: "Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission

¹⁵Par. 9 C. C. A. Rule 14, 1st circuit promulgated, Feb. 23, 1894.

¹⁶Par. 10 C. C. A. Rule 14, 1st circuit promulgated Feb. 23, 1894.

¹⁷Adm. Rule vii. C. C. A. 2nd circuit adopted May 20, 1892.

¹⁸Adm. Rule 7 C. C. A. 9th circuit adopted May 21, 1900.

²⁰Adm. Rule, viii. C. C. A. 2nd circuit adopted May 20, 1812, and Rule 8, C. C. A. 9th circuit adopted May 21, 1900.

issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission."² A similar rule in the ninth circuit provides that: "Such testimony shall be taken by deposition before the clerk of the court, or any United States commissioner, or any clerk of a district or circuit court of the United States, or any notary public, upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission."³

[h] Sixth circuit—further testimony in admiralty causes.

"In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of a United States court or a United States commissioner, by direction of the court, the circuit justice, or either circuit judge, qualified to sit on appeal in said case, after cause shown to such court, justice, or judge that such evidence is material and necessary, and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only on interrogatories settled by such court, justice or judge, upon at least ten days' previous notice to the opposing party or his attorney (accompanied by a copy of the proposed interrogatories), and upon cross-interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof, to be served upon counsel offering testimony."⁴

§ 2091. Use of books in Supreme Court law library how regulated.

During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; and also one dollar per day for each day's detention beyond the limited time.

First clause Supreme court rule 7, revised and corrected Dec. term, 1858.⁷

²Adm. Rule ix. C. C. A. 2nd circuit adopted May 20, 1892.

⁴Rule 35 C. C. A. 6th circuit adopted June 22, 1893.

³Adm. rule 9, C. C. A. 9th circuit, adopted, May 21, 1900.

⁷21 How. vi.

§ 2092. Copy of records, motions, and briefs to be deposited in law library.

The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs or arguments filed therein.

Second clause Supreme Court rule 7, promulgated Oct. 25, 1875.⁸

§ 2093. Books of the court to be kept in conference room.

The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner, and he shall not permit such books to be taken therefrom by any one except the justices of the court.

Clause 3, Supreme Court rule 7, as revised Dec. term, 1858.¹⁰

§ 2094. Supreme Court's adjournment day—no argument or brief three days prior thereto.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

Supreme Court rule 27, revised Dec. term, 1858.¹¹

§ 2095. Appellate proceedings from Porto Rico courts to be in English.

All such proceedings in the Supreme Court of the United States [i. e., appeals and writs of error from Porto Rico courts] shall be conducted in the English language.

Part of § 35 of act April 12, 1900, c. 191, 31 Stat. 85.

§ 2096. On what papers appeals in admiralty heard—review in part only.

The appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

⁸91 U. S. vii.

¹⁰21 How. vi.

¹¹21 How. xv.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

Clause 2 of rule 1 and rule 3 in admiralty in force in second and ninth circuits.

**§ 2097. When appellant in admiralty may proceed to hearing.
—ex parte.**

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

6th admiralty rule in second and ninth circuits.

CHAPTER 62.

DECISION, DISPOSAL OF CAUSE AND MANDATE.

- § 2105. Opinions of Supreme Court to be recorded and delivered to reporter.
- § 2106. Original opinions to be preserved.
- § 2107. Printed opinions when bound, deemed recorded.
- § 2108. —rule in circuit courts of appeal.
- § 2109. Dismissal in vacation on written agreement in Supreme Court.
- § 2110. —in circuit court of appeals.
- § 2111. Dismissal or affirmance where no appearance for plaintiff in error in Supreme Court.
- § 2112. —rule in circuit courts of appeal.
- § 2113. Dismissal for nonappearance of either party.
- § 2114. —rule in circuit courts of appeal.
- § 2115. Judgment may be rendered on nonappearance of defendant.
- § 2116. —rule in circuit courts of appeal.
- § 2117. Dismissal at second term in Supreme Court if neither party ready.
- § 2118. —rule in circuit courts of appeal.
- § 2119. Nature of decree and relief awarded by appellate court—not to issue execution.
- § 2120. Disposition of causes brought up on error to State court.
- § 2121. Supreme Court to remand to proper circuit or district court.
- § 2122. Remand after decision in Supreme Court on writ of error in capital cases.
- § 2123. Remand by circuit court of appeals after decision.
- § 2124. Interest in Supreme Court and circuit courts of appeals on affirmance of judgment below.
- § 2125. Damages allowed on frivolous writ of error.
- § 2126. —when same rule applies to appeals.
- § 2127. —damages and interest in admiralty appeals.
- § 2128. —foregoing provisions apply to review under act of 1891.
- § 2129. Petition for rehearing, what to contain.
- § 2130. —rule in circuit courts of appeal.
- § 2131. Mandate in cases of dismissal in Supreme Court.
- § 2132. —when mandate from Supreme Court to issue.
- § 2133. Mandate on determination of cases in circuit court of appeals.
- § 2134. Entry of decrees in second circuit—bill of costs submitted.

§ 2105.—Opinions of Supreme Court to be recorded and delivered to reporter.

All opinions delivered by the court shall, immediately, upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter, as soon as the same shall be recorded.

Clause 1 of Supreme Court Rule 25, promulgated as part of original rule 41, Mar. 14, 1834.¹

The facts of the case are not usually reproduced in the opinion² and where a case involves only questions of fact which are not useful as precedents, no extended opinion should be delivered.³

§ 2106. Original opinions to be preserved.

The original opinions of the court shall be filed with the clerk of this court for preservation.

Clause 2, Supreme Court Rule 25, promulgated as part of original rule 41, Mar. 14, 1834.⁴

§ 2107. Printed opinions when bound, deemed recorded.

Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Clause 3, Supreme Court rule 25.

§ 2108. — rule in circuit courts of appeal.

The provisions of the rules in the various circuits are similar in the main to the foregoing rules of the Supreme Court.^{[a]-[c]}⁵

Author's section.

[a] Recording of opinions in circuit court of appeals.

In all except the third, fourth and ninth circuits it is provided that "all opinions delivered by the court shall, immediately upon the delivery

¹ 18 Pet. vii.

237, 42 L. ed. 730, 18 Sup. Ct. Rep.

² Harrell v. Beall, 17 Wall. 590, 21 L. ed. 692.

311.

³ Tyler v. Campbell, 106 U. S. 322, 27 L. ed. 162, 1 Sup. Ct. Rep. 293; and see Lewis v. Kengla, 169 U. S. of 7th circuit.

⁴ 8 Pet. vii.

⁵ See C. C. A. Rule 28 in all except the 7th circuit and C. C. A. rule 26

thereof, be handed to the clerk to be recorded.”¹¹ In the third circuit the rule reads “and recorded,” instead of “to be recorded.”¹² In the fourth circuit the rule reads:— “All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges the cost of such printing to be paid by the clerk out of the revenues of his office or charged to the litigants in the respective cases, to be taxed and allowed as other costs.”¹⁴ In the ninth circuit the rule reads: “The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed they shall be deemed to have been recorded within the meaning of this rule.”¹⁵

[b] Clerk to supervise printing in sixth circuit.

“The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, rule 23.”¹⁶

[c] Binding and preservation of opinions in seventh circuit.

“The clerk of this court shall, from time to time, cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk’s office and one set to be kept in the court library.”¹⁷

[d] — how paid in sixth circuit.

“The cost of printing the opinions shall be defrayed out of the amount received for the same, and any deficit shall be paid out of such fees collected by the clerk as are not properly taxable as costs in any case pending in the court.”¹⁸

§ 2109. Dismissal in vacation on written agreement in Supreme Court.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due him, it shall be the duty of the clerk to enter the case dismissed, and to give to either

¹¹Clause 1 of C. C. A. Rule 26, 7th circuit and clause 1, C. C. A. Rule 28 in others.

¹²Clause 1, Rule 28 C. C. A. 3rd circuit.

¹⁴Clause 1 C. C. A. Rule 28, 4th circuit as amended May 29, 1896.

¹⁵C. C. A. Rule 28, as 9th circuit as amended Mar. 2, 1900, 99 Fed. iii.

¹⁶Clause 2 C. C. A. Rule 28, 6th circuit as amended Oct. 22, 1894.

¹⁷Clause 3, C. C. A. Rule 28, 7th circuit as amended May 29, 1896.

¹⁸Clause 4 C. C. A. Rule 28, 6th circuit as amended Oct. 22, 1894.

party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Supreme Court Rule 28, promulgated as Rule 64, Dec. Term, 1857.¹

§ 2110. — in circuit court of appeals.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it, a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Rule 20, circuit court of appeals in force in all circuits.

Dismissal of causes on motion is discussed in a previous Code section.³

§ 2111. Dismissal or affirmance where no appearance for plaintiff in error in Supreme Court.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

Sixteenth Supreme Court rule.

The practice of the Supreme Court has long been in accordance with the above rule. Chief Justice Marshall in an early case stated the practice of the court to be "that when there is no appearance for the plaintiff in error, the defendant may have the plaintiff called and dismiss the writ of error; or may open the record and pray for an affirmance."⁷ "When the case is called for trial" means the time of the actual call for trial and not the time of going through the docket to arrange the business of the court.⁸ Where the appearance has been entered and is subsequently withdrawn the suit may be dismissed or affirmed under the above rule.⁹

§ 2112. — rule in circuit courts of appeal.

The rule is the same as the foregoing Supreme Court rule, in all

¹20 How. iv.

³Ante § 2060, et seq.

⁷Montalet v. Murray, 3 Cranch, 249, 2 L. ed. 429.

⁸Lem Hing Dun v. United States, 49 Fed. 145, 1 C. C. A. 209.

⁹McGuire v. Commonwealth, 3 Wall. 387, 18 L. ed. 226.

save the eighth circuit, where a minor change in phraseology occurs.¹¹

Author's section.

§ 2113. Dismissal for nonappearance of either party.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

Eighteenth Supreme Court Rule, promulgated Dec. Term, 1851, as Rule 59,¹² revised and corrected Dec. Term, 1858.¹³

A writ of error will be dismissed when counsel for neither side appears when the case is called for arguments.¹⁴

§ 2114. — rule in circuit courts of appeal.

The rule in the circuit courts of appeal in all circuits is identical with the foregoing Supreme Court rule, except for a minor change of phraseology in the eighth and ninth circuits.¹⁵

Author's section.

§ 2115. Judgment may be rendered on nonappearance of defendant.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

Rule 17 of Supreme Court.

The above rule is a substantial re-enactment of original rule 15 promulgated December 9, 1801,¹⁶ and of Rule 17, as revised December Term, 1858.¹⁹ In general it is of no importance to appellant whether an appearance for the appellee is entered or not. The failure of the latter to appear will not delay the trial and the judgment against him will be as conclusive as if an appearance for him had been entered on the docket and the case argued by his counsel.²⁰

§ 2116. — rule in circuit courts of appeal.

The rule in the circuit courts of appeal in all circuits is identical with the foregoing Supreme Court rule, except for a minor change

¹¹See Clause 2 C. C. A. rule 22, 1st circuit, clause 1, C. C. A. rule 22 in all other circuits.

¹²12 How. xi.

¹³21 How. xi.

¹⁴Radford v. Craig, 5 Cranch, 289, 3 L. ed. 104.

¹⁵Clause 4 C. C. A. Rule 22, 1st circuit, clause 3 C. C. A. Rule 22 in other circuits. See appendix.

¹⁶1 Cranch. xviii.

¹⁹21 How. xi.

²⁰United States v. Yates, 6 How. 608, 12 L. ed. 575.

of phraseology in the eighth circuit² and an additional provision in the second.

Author's section.

In the second circuit, clause 5 of Rule 22, provides "If either of the parties is ready when the case is called the same may be heard; and if neither party is ready the case may be dismissed or may be postponed to the next session as the court may order."

§ 2117. Dismissal at second term in Supreme Court if neither party ready.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

Supreme Court Rule 19, promulgated as Rule 55, April 24, 1850.⁴

§ 2118. — rule in circuit courts of appeal.

. . . If a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

Part of Rule 17, circuit court of appeals in force in all except the first, sixth, seventh and ninth circuits.

Clause 6 of Rule 22 of the first circuit is the same as the above except that the words "stated sessions" are used instead of the word "terms" and the word "session" instead of the word "term." In the sixth circuit the provision is identical with the last sentence of Rule 17, except that "calendar sessions" is used instead of "term" and "sessions" instead of "term." The rule in the other circuits will be found in the appendix.

§ 2119. Nature of decree and relief awarded by appellate court —not to issue execution.

The Supreme Court may affirm, modify, or reserve any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order

²Clause 3 C. C. A. Rule 22, 1st circuit; clause 2 C. C. A. Rule 22 in all other circuits. See appendix.

⁴8 How. vi.

to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require.^[a] The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.^[b]

R. S. § 701, U. S. Comp. Stat. 1901, p. 571.

[a] In general.

The above section applies to appeals to the circuit court of appeals under the provision of the act of 1891 that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act."⁸ The Supreme Court may order such proceedings in the lower court on a writ of error as justice may require, as provided in the above section;⁹ and has power to modify the judgment of the lower court without reversal.¹⁰ The section applies to both civil and criminal cases.¹¹ The rule is well established however that the appellate court will not ordinarily interfere with the proceedings below without first reversing or modifying the decree.¹²

[b] Not to issue execution.

The power of the Federal courts to issue writs is elsewhere discussed.¹³ On writ of error to State courts the Supreme Court is empowered to issue execution instead of remanding the cause.¹⁴

§ 2120. Disposition of causes brought up on error to State court.

The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court [to which a writ of error has issued¹⁵], and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.

Part of R. S. § 709, U. S. Comp. Stat. 1901, p. 575.

The usual practice of the Supreme Court is to remand the cause to the State court for further proceedings in conformity to the opinion of the court.¹⁶ Where however the cause has been remanded once before and the State court refuses to carry the mandate into effect, the Supreme Court on

⁸Ante, § 1890.

⁹See *Ballew v. United States*, 160 U. S. 200, 40 L. ed. 395, 16 Sup. Ct. Rep. 263.

¹⁰*United States v. Eaton*, 169 U. S. 331, 42 L. ed. 767, 18 Sup. Ct. Rep. 374.

¹¹*Ballew v. United States*, 160 U. S. 200, 40 L. ed. 395, 16 Sup. Ct. Rep. 263.

¹²*Greene v. United Shoe, etc. Co.* 124 Fed. 961, 60 C. C. A. 93, and cases cited.

¹³Ante, § 841.

¹⁴Post, § 2120.

¹⁵Ante, § 38.

¹⁶*Maguire v. Tyler*, 8 Wall. 658,

second appeal or writ of error may proceed to a final decision and award execution to the prevailing party.¹⁹

§ 2121. Supreme Court to remand to proper circuit or district court.

Whenever on appeal or writ of error, or otherwise, a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper district or circuit court for further proceedings, to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise, a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination.^{[a]-[d]}

Post, part of § 10, act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

[a] Remand of cause—mandate, construction and correction thereof

By the terms of the above section the cause is remanded after judgment by the Supreme Court to the lower court and no power is given to the Supreme Court to issue execution. The judgment of the court is embodied in a mandate which the court below is bound to follow.² In construing the mandate the lower court may refer to the opinion of the Supreme Court, in order to ascertain what was intended.³ If the mandate is misunderstood or misconstrued the matter may be carried to the appellate court for correction either by way of new appeal⁴ or upon application for mandamus.⁵ In dealing with State tribunals however another appeal and not mandamus is the proper remedy.⁶ The appellate court has power also to recall a mandate which it has issued in order to correct an

¹⁹Tyler v. Maguire, 17 Wall. 290, 21 L. ed. 586; Martin v. Hunter, 1 Wheat. 354, 4 L. ed. 109; Stanley v. Schwalby, 162 U. S. 281, 40 L. ed. 969, 16 Sup. Ct. Rep. 754.

²Railroad v. Soutter, 2 Wall. 520, 17 L. ed. 900; Gaines v. Rugg, 148 U. S. 239, 37 L. ed. 432, 13 Sup. Ct. Rep. 611. See ante, § 2019.

³In re Sanford, etc. Co. 160 U. S. 256, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; West v. Brashear, 14 Pet. 54, 10 L. ed. 350.

⁴Stewart v. Salamon, 97 U. S. 362, 24 L. ed. 1044; Cook v. Burnley, 11 Wall. 674, 20 L. ed. 84; In re Blake, 175 U. S. 117, 44 L. ed. 95, 20 Sup. Ct. Rep. 42.

⁵Perkins v. Fourniquet, 14 How. 330, 14 L. ed. 441; Gaines v. Rugg, 148 U. S. 238, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; In re Sanford Forks, etc. Co. 160 U. S. 256, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

⁶In re Blake, 175 U. S. 118, 44 L. ed. 96, 20 Sup. Ct. Rep. 42.

erroneous title and description,⁷ but this apparently must be done during the term in which judgment was issued.⁸

[b] Further proceedings in lower court.

A State court should wait until mandate issues before proceeding on the judgment of the Supreme Court. But if it does not its action though not to be commended, is not void.⁹ When the mandate issues the lower court should promptly obey, and treat the judgment as conclusive.¹⁰ The lower court has no discretion as to obeying the mandate.¹¹ Hence when the judgment of the lower court has been reversed or affirmed it cannot be rejudged after remand,¹² and objection to the jurisdiction of the Supreme Court after remand comes too late.¹³ The inferior court may however decide any question left open by the mandate of the appellate court, and such decision is reviewable only by a new appeal.¹⁶ Where the lower court refuses to carry out the mandate mandamus is the proper remedy.¹⁷ Where a judgment of a State court is reversed with directions to conform the same to the opinion of the Supreme Court, the manner of conforming is for the State court to decide.¹⁹

[c] No authority to rehear or grant new trial.

Where the merits of a case have been once decided by the Supreme Court on appeal, the circuit court has no authority without express leave of the Supreme Court, to grant a new trial a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer.² But this rule does not apply to an action of ejectment where the party is entitled, by the laws of the State, to a new trial as of course and the court has no discretion.³

[d] Second appeal or writ of error.

It is a well settled principle that the mandate is conclusive of all points

⁷Killian v. Ebbinghaus, 111 U. S. v. Maquire, 17 Wall. 284, 21 L. ed. 799, 28 L. ed. 593, 4 Sup. Ct. Rep. 576.

⁸Le More v. United States, 131 U. S. 178, 33 L. ed. 1085, 20 Sup. Ct. Rep. 904.
⁹Phips v. Sedgwick, 131 U. S. 251, 33 L. ed. 705, 14 Sup. Ct. Rep. 804; see Ex parte Steamboat Co. 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904; ante, § —.

¹⁰In re Boardman, 169 U. S. 44, 42 L. ed. 653, 18 Sup. Ct. Rep. 291.

¹¹In re Howard, 9 Wall. 183, 19 L. ed. 634.

¹²Gaines v. Rugg, 148 U. S. 239, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Ex parte Morris, 9 Wall. 607, 19 L. ed. 799; see West v. Brashear, 14 Pet. 54, 10 L. ed. 350.

¹³Davis v. Packard, 8 Pet. 323, 8 L. ed. 957.

¹⁴Whyte v. Gibbes, 20 How. 542, 15 L. ed. 1016; Noonan v. Bradley, 12 Wall. 129, 20 L. ed. 281; Tyler

¹⁵Ex parte Union Steamboat Co. 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904.
¹⁶In re City Nat. Bank, 153 U. S. 251, 38 L. ed. 705, 14 Sup. Ct. Rep. 804; see Ex parte Steamboat Co. 178 U. S. 319, 44 L. ed. 1085, 20 Sup. Ct. Rep. 904; ante, § —.

¹⁷Davis v. Packard, 8 Pet. 324, 8 L. ed. 957.
¹⁸In re Potts, 166 U. S. 267, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Stewart v. Salamon, 97 U. S. 362, 24 L. ed. 1045; Southard v. Russell, 16 How. 570, 14 L. ed. 1063; Ex parte Railroad, 1 Wall. 73, 17 L. ed. 515.

¹⁹Smale v. Mitchell, 143 U. S. 109, 36 L. ed. 90, 12 Sup. Ct. Rep. 353.

decided.⁴ Hence if a second writ of error is sued out or a second appeal allowed, nothing but proceedings subsequent to the mandate can be reviewed, and inquiry into the merits of the original judgment or decree cannot be had.⁵ Appeal therefore, from the decree of the inferior court which is entered in exact accordance with the mandate of the Supreme Court, will be dismissed with costs.⁶

§ 2122. Remand after decision in Supreme Court on writ of error in capital cases.

When any such judgment [i. e., in a capital case in any court of the United States to which a writ of error from the Supreme Court has been sued out]⁷ shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution.

Part of § 6, act Feb. 6, 1889, c. 113, 25 Stat. 656, U. S. Comp. Stat. 1901, p. 570.

§ 2123. Remand by circuit court of appeals after decision.

Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.^{[a]-[b]}

Last part of § 10, act Mar. 3, 1891, c. 517, 26 Stat. 829, U. S. Comp. Stat. 1901, p. 552.

⁴Illinois v. Illinois, etc. R. R. 184 U. S. 91, 46 L. ed. 446, 22 Sup. Ct. Rep. 300; United States v. Camou, 184 U. S. 574, 46 L. ed. 696, 22 Sup. Ct. Rep. 505; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1168.
⁵United States v. Camou, etc. R. R. 184 U. S. 574, 46 L. ed. 694, 22 Sup. Ct. Rep. 505; United States v. Indians, 173 U. S. 472, 43 L. ed. 772, 19 Sup. Ct. Rep. 487; Texas, etc. R. R. v. Anderson, 149 U. S. 242, 37 L. ed. 717, 13 Sup. Ct. Rep. 843; Thompson v. Maxwell, etc. R. Co. 168 U. S. 456, 42 L. ed. 541, 18 Sup. Ct. Rep. 121; Wayne Co. v. Kennicott, 94 U. S. 498, 24 L. ed. 260; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Lewisberg Bank v. Sheffey, 140 U. S. 452, 35 L. ed. 493, 11 Sup. Ct. Rep. 755.
⁶Stewart v. Salamon, 97 U. S. 362, 24 L. ed. 1044; Humphrey v. Baker, 103 U. S. 737, 26 L. ed. 456; Mackall v. Richards, 116 U. S. 46, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; Aspen Min. Co. v. Billings, 150 U. S. 37, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.
⁷Ante, § 59.

[a] In general.

When the cause is remanded by the circuit court of appeals the lower court must execute the mandate and has no power to reverse, modify or enlarge it.⁹ But the latter court cannot be compelled when engaged in the regular trial of cases on a day not a motion day, to drop all business and immediately grant a motion for a judgment in accordance with a mandate from the appellate court.¹⁰ The circuit court of appeals has equitable power to reserve leave to the court below to hear a motion by a defeated complainant to amend his pleadings. Such power is discretionary however and leave will not be reserved where the complainant was defeated below on the merits and made no application to amend before the appeal, nor merely to permit a continuance of the litigation where there are no equities strong enough to justify it.¹¹

[b] Second appeal.

A new question arising in the trial court in proceedings subsequent to the mandate of an appellate court, and not included therein may be the subject of another appeal or writ of error.¹² But the second writ of error or appeal brings up only subsequent proceedings and does not authorize a reconsideration of any question either of law or fact that was considered and determined on first appeal or writ of error.¹⁴

§ 2124. Interest in Supreme Court and circuit courts of appeal on affirmance of judgment below.

In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

Clause 1 of 23rd Supreme Court Rule promulgated as original Rule 62, Dec. Term, 1851.¹⁷

The first clause of circuit court of appeals Rule 30, in force in all except the first and seventh circuits is the same as the above rule except that it reads "in this court" instead of "to this court," "State or Territory" instead of "State," and "was rendered" instead of "is rendered." The same changes exist in clause 1 of Rule 30 of the first circuit, except that the phrase "or territory" is omitted. In the seventh circuit the above provision, with the changes above noted, is subdivided in the first clause of Rule 28.

⁹Bissell, etc. Co. v. Goshen, etc. Co. 72 Fed. 545, 19 C. C. A. 25. v. Watertown, 68 Fed. 859, 16 C. C. A. 37.

¹⁰In re Hall, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723.

¹¹Post v. Beacon, etc. Co. 89 Fed. 6, 32 C. C. A. 151.

¹²Laidlaw v. Navigation Co. 81 Fed. 876, 26 C. C. A. 665; Metcalf

¹⁴Mathews v. Columbia Nat. Bank, 100 Fed. 393, 40 C. C. A. 444; Balch v. Haas, 73 Fed. 974, 20 C. C. A. 151; see also ante, § 2121 and note.

¹⁷13 How. v.

Prior to the adoption of the above rule the rate of interest was six per cent.¹⁹ The object in making the change was to put suitors in the Federal courts on the same footing with suitors in the State courts in like cases.²⁰ Hence the present rate of interest is the amount allowed in the particular State in which judgment is rendered.¹ If no such rate is fixed a reasonable rate will be allowed.

§ 2125. Damages allowed on frivolous writ of error.

In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

Clause 2, Rule 23, Supreme Court as amended May 1, 1871,⁴ cl. 2, Rule 28, 7th circuit and clause 2, Rule 30, in all other circuits.

A practice similar to that set forth in the above rule had long been followed by the Supreme Court.⁵ But prior to the adoption of this rule as amended, the question of damages was not considered as distinct from that of interest and under the early practice interest was computed as part of the damages.⁶ Under the above rule however the damages and interest may both be given.⁷ While ten per cent is mentioned as the amount of damages there is no legal right given either by the rule or by statute whereby the parties may claim that amount, or in fact any damages at all, and the rule has been construed as fixing the amount beyond which the court cannot go, but leaving it to the discretion of the court whether or not any damages at all shall be given.⁸

Ten per cent damages with interest has been allowed in many cases in accordance with the rule.⁹ The writ of error has been regarded as frivolous where no question has been raised for the courts consideration,¹⁰ or where the law as settled by precedent has been disregarded.¹¹ But where

¹⁹Sneed v. Wister, 8 Wheat. 690, 5 L. ed. 717; Mitchell v. Harmony, 13 How. 116, 14 L. ed. 76.

²⁰Hemmenway v. Fisher, 20 How. 259, 15 L. ed. 799.

¹Perkins v. Fourniquet, 14 How. 328, 14 L. ed. 441; Railroad Co. v. Turrill, 101 U. S. 836, 25 L. ed. 1009; Hemmenway v. Fisher, 20 How. 259, 15 L. ed. 799.

⁴11 Wall. 10.

⁵See original rules 17 and 18, promulgated Feb. term 1803, 1 Oranch, xviii.

⁶See West Wisconsin Ry. v. Foley, 94 U. S. 101, 24 L. ed. 71.

⁷Idem.

⁸West Wisconsin Ry. v. Foley, 94 U. S. 103, 24 L. ed. 71.

⁹Hennessy v. Sheldon, 12 Wall. 440, 20 L. ed. 446; Insurance Co. v. Huchbergers, 12 Wall. 166, 20 L. ed. 365; Gregory, etc. Mining Co. v. Starr, 141 U. S. 227, 35 L. ed. 715, 11 Sup. Ct. Rep. 914; Texas, etc. Ry. v. Volk, 151 U. S. 79, 38 L. ed. 78, 14 Sup. Ct. Rep. 239; Chicago, etc. R. v. Bomberger, 130 Fed. 884, 65 C. C. A. 64.

¹⁰Jenkins v. Banning, 23 How. 457, 16 L. ed. 581; Kilbourne v. Savings Inst. 22 How. 503, 16 L. ed. 370.

¹¹Pennywit v. Eaton, 15 Wall. 382, 21 L. ed. 114.

the writ was apparently prosecuted in good faith damages will be refused.¹² Interest does not run on the damages but merely on the judgment.¹³

§ 2126. — when same rule applies to equity appeals.

The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by the court.

Clause 3, Rule 23, promulgated as part of original rule 62, Dec. Term, 1851,¹⁵ and cl. 3, C. C. A. Rule 28, 7th circuit and C. C. A. Rule 30, in all other circuits.

The Supreme Court may adjudge damages for delay on appeals as well as on error and this power is not confined to money judgments.¹⁶ The court is the sole judge of the propriety of allowing damages on appeal.¹⁷

§ 2127. — damages and interest in admiralty appeals.

In cases in admiralty, damages and interest may be allowed if specially directed by the court.

Clause 4, Supreme Court Rule 23, as amended March 10, 1890,¹⁸ and clause 4 C. C. A. Rule 28, 7th Circuit and of C. C. A. Rule 30, in all other circuits.

Admiralty appeals to the Supreme Court are limited by the judiciary act of 1891¹⁹ to direct appeals in cases of prize. Admiralty Rule 19²⁰ of the circuit court of appeals for the second circuit includes the above rule as one of those applicable in admiralty cases in that circuit.

§ 2128. — foregoing provisions apply to review under act of 1891.

The provisions of Rule 23 . . . of this court, in regard to interest³ . . . shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6⁴ of the said act [i. e., act of 1891].

Thirty-eighth Supreme Court Rule, promulgated May 11, 1891.⁵

§ 2129. Petition for rehearing, what to contain.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and

¹²McKee v. Rains, 10 Wall. 26, 19 L. ed. 861.

¹³Jennings v. The Perseverance, 3 Dall. 338, 1 L. ed. 626.

¹⁵13 How. v.

¹⁶Gibbs v. Diekma, 131 U. S. clxxxvi, 26 L. ed. 176.

¹⁷Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127.

¹⁸133 U. S. 711.

¹⁹Ante, § 42.

²⁰See ante, § 1934 also appendix.

³Applies also to costs and fees.

See ante, § 1847.

⁴Ante, §§ 39, 42.

⁵139 U. S. 707.

distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Rule 30, Supreme Court.

A rehearing will not be granted except at the desire of a member of the court, and on consent of the majority;⁸ hence equal division of the court on motion for rehearing is in effect a denial thereof.⁹ The court may of its own motion order a rehearing.¹⁰ If this is not done it is proper for the counsel to submit without argument a brief petition properly certified embodying the points thought important.¹¹ If upon such petition any judge who concurred in the decision thinks it proper to move for a rehearing the motion will be considered. If not so moved the rehearing will be denied as of course.¹² The petition must be presented during the term at which judgment was entered, and if this is not done it will not be considered, in the absence of special leave granted during the term.¹³

A strong case for a rehearing is presented where the record on appeal is imperfect on account of the omission of material evidence, but through no fault of the appellee.¹⁴ The fact that a case is one of importance has been held no ground for a rehearing.¹⁵ Nor will a rehearing be granted because the court misquoted testimony in its opinion, the result not being effected thereby,¹⁶ nor, on appeal, on the grounds of newly discovered evidence.¹⁷

§ 2130. — rule in circuit courts of appeal.

In the 2nd, 3rd, 4th and 8th circuits the rule is exactly the same as the foregoing Supreme Court rule.²⁰ The rules in the other circuits appear in the note.^{[a]-[e]}

Author's section.

[a] In first circuit.

"A petition for rehearing after judgment may be filed at the term at

⁸Ambler v. Whipple, 23 Wall. 282, 131 U. S. 390, 33 L. ed. 201, 9 Sup. Ct. Rep. 127.

⁹Carmichael v. Eberle, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 571. ¹⁴Ambler v. Whipple, 23 Wall. 278, 23 L. ed. 127.

¹⁰Brown v. Aspdon, 14 How. 25, 14 L. ed. 311. ¹⁵Camfield v. United States, 67 Fed. 17, 14 C. C. A. 228.

¹¹Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231. ¹⁶Torrent v. Lumber Co. 32 Fed. 229.

¹²Public Schools v. Walker, 9 Wall. 604, 19 L. ed. 651. ¹⁷Maxwell Land Grant Case, 122 U. S. 365, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1271, see also The Iron Chief, 63 Fed. 294, 11 C. C. A. 196.

¹³Bushnell v. Crooke, etc. Co. 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 22; see also Williams v. Conger, circuits. ²⁰See C. C. A. Rule 29 in those

which the judgment is entered and within one calendar month after such entry, and not later, unless by leave granted during the term. It must be in print in the form and style required by Rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment, desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after entry of judgment, and with the same effect after the term as though filed before the adjournment.”¹

[b] In the fifth circuit.

“A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, and must be printed and briefly and distinctly state its grounds without argument, and be supported by a certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.”³

[c] In the sixth circuit.

“A petition for rehearing after judgment can be presented only within thirty days after such judgment, and not later, unless by special leave granted during such thirty days; and must be printed, and briefly and succinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.”⁵

[d] In the seventh circuit.

“A petition for rehearing must be filed within thirty days after entry of judgment or decree or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer; and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.”⁷

[e] In the ninth circuit.

“A petition for rehearing may be presented within fifteen days after judgment. It must be printed, and briefly and distinctly state its grounds,

¹Rule 29 C. C. A. 1st circuit as amended Oct. 4, 1898.

⁵Rule 29 C. C. A. 6th circuit as amended June 22, 1893.

³Rule 29 C. C. A. 5th circuit as amended Jan. 12, 1905, see 133 Fed.

⁷Rule 27 C. C. A. 7th circuit as amended Feb. 10, 1899.

iv.

and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.”⁹

§ 2131. Mandate in cases of dismissal in Supreme Court.

In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Clause 5 of 24th Supreme Court Rule, promulgated as Rule 49, Jan. Term, 1838.¹⁰

The authorities respecting mandate are referred to under another Code section.¹¹

§ 2132. — when mandate from Supreme Court to issue.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

Thirty-ninth Supreme Court Rule, promulgated Nov. 25, 1895.¹²

A writ of error having been dismissed for want of jurisdiction, the Supreme Court has issued a mandate at once no opposition having been made.¹³

§ 2133. Mandate on determination of cases in circuit court of appeals.

In the second, third, fourth, seventh and eighth circuits the rules provide that “in all cases finally determined in this court, a mandate, or other proper process in the nature of a procedendo, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.”¹⁵ The rules in the other circuits appear in the

⁹Rule 29 C. C. A. 9th circuit.

¹⁰12 Pet. vii.

¹¹Ante, § 2121.

¹²159 U. S. 709.

¹³Pacific Express Co. v. Malin, 131

U. S. 395, 33 L. ed. 204, 9 Sup. Ct. Rep. 792.

¹⁵See C. C. A. Rule 30 in 7th circuit C. C. A. Rule 32 in other circuits.

note.^{[a]-[d]} In the second circuit there is also an admiralty rule as to mandate.^[e]

Author's section.

[a] For the first circuit—when to issue.

"In every case finally determined, a mandate or other proper process in the nature of a procedendo shall be issued to the court below for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but unless otherwise ordered, it shall issue as of course, after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of."¹⁶

[b] In the fifth circuit—when to issue.

"Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case. Provided that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, and amendments thereto the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges."¹⁷

[c] In the sixth circuit—when to issue—to be accompanied by opinion.

"In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by Rule 29¹⁸ and no mandate or other process of procedendo shall issue when a petition to rehear is pending unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

[d] In ninth circuit—costs thereof—mandate when to issue.

"In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo, at the request of counsel for the pre-

¹⁶Rule 32 C. C. A. 1st Circuit as amended Oct. 4, 1898. ¹⁸32nd Rule C. C. A. 6th circuit as amended Oct. 2, 1894.

¹⁷32nd Rule C. C. A. 5th circuit as amended Jan. 12, 1905.

ailing party and upon the payment of any costs due in the case, shall be issued, as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of fifteen days from the date of such final determination unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition.”¹⁹

[e] **Mandate in admiralty causes in second circuit.**

“The decrees of this court shall direct that a mandate issue to the court below.”²⁰

§ 2134. Entry of decrees in second circuit—bill of costs submitted.

At the expiration of ten days after a case has been decided the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorney.

2nd clause rule 36, circuit court of appeals for the second circuit.

¹⁹32nd Rule C. C. A. 9th circuit.

²⁰Adm. Rule xvi. C. C. A. 2nd circuit as amended May. 8, 1898.

CHAPTER 63.

BANKRUPTCY JURISDICTION AND PROCEDURE IN GENERAL.

- § 2199. Cross references.
- § 2200. Jurisdiction in bankruptcy.
- § 2201. Effect of bankruptcy on pending suits—limitation of suits against trustee.
- § 2202. Courts in which trustee shall sue.
- § 2203. Jurisdiction of suits for recovery of property fraudulently conveyed, etc.
- § 2204. Extent of circuit court's jurisdiction.
- § 2205. —concurrent jurisdiction of offenses.
- § 2206. Supreme Court to prescribe rules, forms and orders.
- § 2207. Proceedings to conform to practice in equity or at law as case may be.
- § 2208. Prescribed forms to be followed.
- § 2209. Designation of newspapers for publication of notices.
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- § 2212. Duties of clerk.
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- § 2215. What covered thereby.
- § 2216. Bankruptcy docket.
- § 2217. Filing and endorsement of papers.
- § 2218. Process—blanks furnished referees.
- § 2219. Conduct of proceedings in person or by attorney—endorsements, service on attorney.
- § 2220. Duty to advance money or indemnify for expenses—repayment out of estate.
- § 2221. —order as to payment of fees after filing of petition.
- § 2222. Marshal's fees in bankruptcy.
- § 2223. Marshal to return sworn accounts of actual and necessary expenses.
- § 2224. Duty of Attorney General as to bankruptcy statistics.
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- § 2226. Who may become bankrupts—voluntarily.
- § 2227. —involuntarily.
- § 2228. —partnerships.
- § 2229. Death or insanity of bankrupt not to abate proceedings.
- § 2230. Duties of bankrupt.

§ 2199. Cross references.

In other chapters of this code will be found provisions relating to the removal of bankrupts from one district to another.¹ the attendance of witnesses outside the State² the power of a bankruptcy court to issue process³ and punish for contempt⁴ and provisions relating to contempts before referees.⁵

Author's section.

§ 2200. Jurisdiction in bankruptcy.

The courts of bankruptcy^[a] as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held,^[b] to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdiction for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;^[c] (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar con-

¹Ante, § 1539.

²Ante, § 1754.

³Ante, § 850.

⁴Ante, § 809.

⁵Ante, § 810.

trolling bodies, of corporations for violation of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estate; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;^[a] (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions;^[e] (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.^[f] Nothing in this section contained shall be construed to deprive a court of bank-

ruptcy of any power it would possess were certain specific powers not herein enumerated.

§ 2 of act July 1, 1898, c. 541, 30 Stat. 545, U. S. Comp. Stat. 1901, p. 3420.

[a] Bankruptcy in general

Prior to the present bankruptcy act which was passed in 1898¹⁰ and which went into effect January 1, 1899, three previous enactments were passed, the first in 1800,¹¹ repealed in 1803,¹² the second in 1841¹³ repealed in 1843,¹⁴ and the third in 1867¹⁵ repealed in 1878.¹⁶ The power to establish such laws is vested in Congress by the Constitution which authorizes that body "to establish . . . uniform laws on the subject of bankruptcies throughout the United States"¹⁷ and the constitutionality of the present act, as well as the acts of 1841 and 1867, has been sustained by the courts.¹⁸ The effect of the act is to supersede all State bankrupt or insolvency laws.¹⁹ Thus it is held that a State law regulating voluntary assignments for the benefit of creditors is an insolvency law and therefore suspended.²⁰ But State attachment laws are not abrogated by the act.¹ The act is remedial and should be interpreted reasonably with a view to effect its object.²

[b] Jurisdiction of court.

The district court has general and exclusive jurisdiction as a bankruptcy court such jurisdiction being conferred by statute.⁷ Such court is a court of equity "seeking to administer the law according to its spirit and not merely by its letter."⁸ It is court of record, though of limited jurisdiction⁹ and always open for the transaction of business having no separate terms.¹⁰ While ancillary proceedings in another district are not expressly provided for by the present act or by the prior bankruptcy acts of 1841 and 1867,¹¹ and while the existence of jurisdiction in such cases has been doubted or denied under the present act,¹² it has

¹⁰Act July 1, 1898, c. 541, 30 Stat. 545; In re Lumber Co. 137 Fed. 643; In re Salmon, 143 Fed. 395.

¹¹Act April 4, 1800, 2 Stat. 19.

¹²Act Dec. 19, 1803, 2 Stat. 248.

¹³Act Aug. 19, 1841, 5 Stat. 440.

¹⁴Act Mar. 3, 1843, 5 Stat. 614.

¹⁵Act Mar. 2, 1867, 14 Stat. 517.

¹⁶Act June 7, 1878, 20 Stat. 99.

¹⁷U. S. Const. art. 1, sec. 2, cl. 4.

¹⁸In re Curtis, 91 Fed. 737; In re Smith, 92 Fed. 135; but see In re Sievers, 91 Fed. 368.

¹⁹In re Ogles, 93 Fed. 426.

²⁰Norcross v. Nathan, 99 Fed. 414.

¹In re Shoesmith, 135 Fed. 688, 68 C. C. A. 322.

²In re Kane, 127 Fed. 552, 62 C. C. A. 616.

³In re Columbia, etc. Co. 101 Fed. 970.

⁴In re Ives, 113 Fed. 911, 51 C. C. A. 541.

⁵See In re Benedict, 140 Fed. 57.

⁶In re Williams, 120 Fed. 38;

⁷In re Bruss, etc. Co. 90 Fed. 651; Ross, etc. Foundry Co. v. Car, etc. Co. 124 Fed. 403; In re Schrom, 97

been sustained by the Supreme Court,¹³ and seems to be within the full equity powers conferred on bankruptcy courts.¹⁴ Thus an ancillary receiver has been appointed by the court of another district in which property of bankrupt is situated to aid court of original jurisdiction pending selection of trustee.¹⁵ So also the court of another district has ordered funds held by party within its jurisdiction to be paid to receiver appointed by another court.¹⁶ Likewise it is held that the court of another district has ancillary jurisdiction to grant creditors application for examination of witnesses.¹⁷

[c]—to adjudge bankrupt.

Under this section a party may be adjudged a bankrupt who has had his principal place of business, resided or had his domicile within the court's jurisdiction for the greater portion of the preceding six months.¹ So if party is not a resident he may be declared a bankrupt in the district where he has his principal place of business² and if a corporation where its assets and manufacturing plant are³ or if it has ceased manufacturing, at the place where its executive and banking business is conducted.⁴ "Residence" does not include so much as "domicile" which requires an intention to remain⁵ but it must be bona fide and not merely for the purpose of filing bankruptcy petition.⁶ The burden of showing a change of domicile is on him who asserts it.⁷ Where a corporation has its domicile in one district and its principal place of business in another, the courts of both have concurrent jurisdiction.⁸ If a corporation has its principal place of business in the district for the required time the court has jurisdiction although no certificate for doing business has been obtained.⁹

[d]—to appoint receivers—to collect and distribute assets.

The court may appoint a receiver at its discretion when necessary to preserve an estate¹⁵ and such appointment is not reviewable by mandamus.¹⁶ Since State insolvency laws were suspended by the Bankruptcy act,¹⁷ the court is held to have jurisdiction of motion to appoint a receiver

Fed. 760, under earlier acts, see *Markson v. Heaney*, 1 Dill. 497, Fed. 255. See also *Tiffany v. Milk Co.* 141 Cas. No. 9,098; *In re Richardson*, 2 Fed. 444.

Ben. 517, Fed. Cas. No. 11,774.

¹³*Lathrop v. Drake*, 91 U. S. 518, 23 L. ed. 414, and see also *Sherman v. Bingham*, 3 Cliff. 552, Fed. Cas. No. 12,762; *In re Sutter*, 131 Fed. 654; *In re Peiser*, 115 Fed. 199.

¹⁴See *In re Benedict*, 140 Fed. 55.

¹⁵*Idem.*

¹⁶*In re Peiser*, 115 Fed. 199.

¹⁷*In re Sutter*, 131 Fed. 654.

¹*In re Garneau*, 127 Fed. 678, 62 C. A. 403.

²*In re Brice*, 93 Fed. 942; *In re Mackey*, 110 Fed. 355.

³*Dressel v. Lumber Co.* 107 Fed. 255. See also *Tiffany v. Milk Co.* 141 Cas. No. 9,098; *In re Richardson*, 2 Fed. 444.

⁴*In re Marine, etc. Co.* 91 Fed. 630.

⁵*In re Williams*, 99 Fed. 544.

⁶*In re Garneau*, 127 Fed. 679, 62 C. C. A. 403.

⁷*In re Scott*, 111 Fed. 144.

⁸*In re Button Co.* 137 Fed. 668.

⁹*In re Duplex, etc. Co.* 142 Fed. 906.

¹⁵See *In re Francis*, 136 Fed. 912.

¹⁶*Edenburg, etc. Co. v. Humphreys*, 134 Fed. 839, — C. C. A. —.

¹⁷*Supra*, note.[a].

although bankruptcy proceedings were begun in State court.¹⁸ An assignee under general assignment is not ineligible for the office.¹⁹ While the receiver cannot exercise the general powers of a trustee²⁰ being only custodian of the property, he may protect the property though not authorized to do so.¹ But he cannot take property held adversely by third parties.² Nor can he act in his official capacity outside of the district.³

The assets of a bankrupt in custody of bankruptcy court are distributable only under the order of the court, hence cannot be levied on by sheriff on judgment against trustee.⁷ The words of clause 7 above, "except as herein otherwise provided" refer to the provisions of section 23 of the bankruptcy act,⁸ limiting the jurisdiction of bankruptcy courts.⁹ The court cannot administer property in hands of State receiver appointed more than four months prior to the filing of the petition.¹⁰

[e] — to close estates, modify or confirm referees findings and determine exemptions.

It is the duty of the court to close the estate as soon as practicable.¹⁵ The proceedings may however be reopened in order to administer new assets.¹⁶ The petition to reopen need not be of formal character, but must show that there are some unadministered assets.¹⁷ The court may review the referees findings and orders but a petition therefor is required.¹⁸ And the referee cannot of his own motion certify a question to the court, not raised by the parties.¹⁹ The referees findings will not be reversed unless clearly against the weight of evidence.²⁰ The court has jurisdiction to determine the bankrupts right to exemptions,¹ and this without limitation as to time.² The right to exemptions is governed by State laws³ which will be liberally construed.⁴

¹⁸In re Bouss, etc. Co. 90 Fed. 651.

¹⁹In re Etheredge Furniture Co. 92 Fed. 329.

²⁰In re Kleinhans, 113 Fed. 109; Booneville, etc. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43.

¹See in re Kolin, 134 Fed. 557, 67 C. C. A. 481.

²In re Kolin, 134 Fed. 558, 67 C. C. A. 481.

³In re Benedict, 140 Fed. 55.

⁷In re Neely, 108 Fed. 371.

⁸Post, § 2202, 2204.

⁹Bryan v. Bernheimer, 181 U. S. 194, 45 L. ed. 818, 21 Sup. Ct. Rep. 557.

¹⁰In re Heckman, 140 Fed. 859, (C. C. A.) and cases cited.

¹⁵In re Stein, 94 Fed. 125.

¹⁶In re Shaffer, 104 Fed. 982.

¹⁷In re Newton, 107 Fed. 429, 46 C. C. A. 399.

¹⁸Gen'l Order No. 27, post, § 2343; see also In re Russell, 105 Fed. 501; In re Smith, 93 Fed. 791.

¹⁹In re Reukauff etc. Co. 135 Fed. 251.

²⁰In re Covington, 110 Fed. 143; In re Lafleche, 109 Fed. 307; In re Cole, 135 Fed. 439; In re Shults, 135 Fed. 623; In re Romine, 138 Fed. 837; as to transmission of records to court see post, § 2336.

¹In re Lucius, 124 Fed. 455; McGahan, v. Anderson, 113 Fed. 115, 51 C. C. A. 92.

²In re White, 103 Fed. 774.

³Lipman v. Stein, 134 Fed. 235, 67 C. C. A. 17; In re Wunder, 133 Fed. 821.

⁴In re Kane, 127 Fed. 552, 62 C. C. A. 616.

[f] — to make and enforce orders.

The court has jurisdiction to order the bankrupt to deliver up assets in his possession⁹ also to issue injunctions to protect or preserve assets¹⁰ to restrain suits against the trustee,¹¹ and to issue an order in the nature of a writ of ne exeat against the bankrupt.¹² Since in bankruptcy proceedings the Federal courts are not forbidden to enjoin State courts¹³ injunctions have issued restraining replevin suits in such courts¹⁴ also ejectment suits brought against bankrupt and receiver¹⁵ and proceedings in State courts supplementary to execution.¹⁶ Orders made by the court may be vacated, regardless of the terms of court elapsed, where rights vested thereunder will not be disturbed.¹⁷ The court may fine or imprison a bankrupt failing to comply with its orders to surrender assets,¹⁸ and such imprisonment is not imprisonment for debt.²⁰ But before committing him, the court should be satisfied as to his ability to comply with the order.¹ It cannot lawfully commit him for failing to deliver assets not in his possession, since such would be an imprisonment for debt.²

§ 2201. Effect of bankruptcy on pending suits—limitation of suits against trustee.

Suits by and against Bankrupts.—a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A trustees may, with the approval of the court, be permitted to prosecute as trustees any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

⁹Mueller v. Nugent, 184 U. S. 14, 46 L. ed. 411, 22 Sup. Ct. Rep. 269; In re De Gattardi, 114 Fed. 328.

¹⁰Rumsey etc. Co. v. Novelty Mfg. Co. 99 Fed. 699.

¹¹In re Gutman, 114 Fed. 1009.

¹²In re Lipke, 98 Fed. 971.

¹³Ante, § —.

¹⁴In re Russell, 101 Fed. 248, 41 C. A. 323.

¹⁵In re Chambers, etc. Co. 98 Fed. 865.

¹⁶In re Kletchka, 92 Fed. 901.

¹⁷In re Ives, 113 Fed. 913, 51 C. C. A. 541.

¹⁸In re Wilson, 116 Fed. 419; In re De Gattardi, 114 Fed. 328.

²⁰See In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207; see also Ripon, etc. Works v. Schreiber, 101 Fed. 810. As to contempts before referee, see post, § 2335.

¹See Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451.

²Idem.

d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 11 of act July 1, 1898, c. 541, 30 Stat. 549, U. S. Comp. Stat. 1901, p. 3426.

This section of the act applies to both voluntary and involuntary proceedings in bankruptcy.⁶ As to stays of suits against bankrupts, the dischargeability of the debt seems the basis of the right to the stay,⁷ and the suit must be pending.⁸ So it is held that a suit against the bankrupt for defrauding plaintiff out of real estate by false representations will not be stayed,⁹ since a judgment if obtained would not be dischargeable.¹⁰ Likewise a stay of proceedings commenced by wife of bankrupt to obtain overdue alimony, was denied on the ground that such debt would not be released by the discharge.¹¹ Such a debt however would seem dischargeable and it has been so held, and a stay has been granted in such case.¹² After adjudication the right to order a stay is discretionary with the court.¹³ Hence a stay of a suit, the judgment in which is not enforceable against the bankrupt, need not be granted merely because the judgment may result in a diminution of the estate.¹⁴ The courts discretion will not be interfered with on appeal unless it has been abused.¹⁵ In one case it has been held that the application for the stay should be made to the State court.¹⁶ But it is usually made to the court of bankruptcy¹⁷ which may hear and decide the question or refer the application to the referee to report the facts.¹⁸ While this section allows a stay of a pending suit, it does not apply where the State court has acquired jurisdiction over the property of the bankrupt on attachment prior to the bankruptcy petition.¹⁹ A discharge having been granted the stay should ordinarily be vacated as a matter of course on application of the creditor.²⁰

Under the above provision the court may order the trustee to appear and defend any pending suit against the bankrupt and when he does so he is bound by the judgment.⁴ The trustee may also be allowed to prosecute suits, but only those in which the estate is concerned.⁵ He

⁶In re Richards, 96 Fed. 935, 37 C. C. A. 634.

⁷In re Katz, 1 Am. B. R. 19; by § 17 of the Bankruptcy act a discharge in bankruptcy is a release from all provable debts except certain ones therein enumerated. As to what are provable debts, see § 63 of the act printed in appendix II.

⁸In re Claiborne, 109 Fed. 74.

⁹In re Cole, 106 Fed. 837.

¹⁰§ 17 (2) Bankruptcy Act.

¹¹In re Shepard, 97 Fed. 187.

¹²In re Houston, 94 Fed. 119; and see Wagner v. U. S. 104 Fed. 133, 43 C. C. A. 445; as to stay of foreclosure suits see In re Holloway, 93 Fed. 638, also In re Iron etc. Co. Fed. Cas. No. 7,065, 9 Blatchf. 320.

¹³In re Lesser, 99 Fed. 913, 40 C. C. A. 177.

¹⁴In re Franklin, 106 Fed. 666.

¹⁵In re Lesser, 99 Fed. 913, 40 C. C. A. 177.

¹⁶In re Geister, 97 Fed. 322.

¹⁷See, In re Bolmger, 1 N. B. N. 254; In re Klein, 97 Fed. 31.

¹⁸Post, § 2340.

¹⁹See In re Shoemaker, 112 Fed. 648; see also Pickens v. Dent, 106 Fed. 653; 45 C. C. A. 522; In re Knight, 125 Fed. 42, 43.

²⁰In re Rosenthal, 108 Fed. 368.

⁴In re Van Alstine, 100 Fed. 929; as to prosecution of suits by trustees under act of 1867, see Thatcher v. Rockwell, 105 U. S. 467, 26 L. ed. 949.

⁵In re Haensell, 91 Fed. 355.

has been ordered under this section to apply to the State court to be substituted as plaintiff in order to obtain funds in State receivers hands.⁶ The fourth clause of the above section providing for the bringing of suits by or against the trustee differs from the earlier act of 1867, which barred all suits not "brought within two years from the time the cause of action shall have accrued for or against such assignee."⁷

§ 2202. Courts in which trustee shall sue.

Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.

Clause b of § 23, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 8, 32 Stat. 798, U. S. Comp. Stat. 1905. p. 686.

The amendment above mentioned consisted of the addition of the last clause beginning "except suits for the recovery of property" etc. Prior thereto the jurisdiction of the Federal courts was limited to those cases mentioned above, which might have been brought by the bankrupt in the absence of a bankruptcy law, unless the proposed defendant consented.

Hence where the holding of the proposed defendant was adverse, suit could be brought only in the State court, or in the circuit court where the jurisdictional facts appeared, the district court having no jurisdiction unless by the defendant consent.¹⁰ Sections 60 (b) and 67 (e) mentioned in the above amendment refer to suits to recover property preferentially or fraudulently transferred or encumbered. Such suits therefore may be laid in the district court,¹¹ and in any State court which would have had jurisdiction had not bankruptcy intervened.¹² By an amendment to section 70 (e) the district court is also given jurisdiction over suits by trustee to avoid any transfer by the bankrupt of property, which a creditor might have avoided, and to recover the property or its equivalent.¹³

The question whether a party is amenable to summary process by the court seems to depend on the nature of his claim. If his claim is strictly adverse he is not.¹⁶ Hence property held adversely by a third party under

⁶In re Price, 92 Fed. 989.

⁷Act Mar. 2, 1867, c. 176; for cases arising under that act see *Jenkins v. Bank*, 106 U. S. 571, 27 L. ed. 304, 2 Sup. Ct. Rep. 1; *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636.

¹⁰*Bardes v. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006; *Wall*

v. Cox, 181 U. S. 244, 45 L. ed. 845, 21 Sup. Ct. Rep. 642; *Robinson v. White*, 97 Fed. 33.

¹¹See post, § 2203.

¹²See Bankruptcy Act, §§ 60 (b) 67 (e) as amended 1903.

¹³Post, § 2203.

¹⁶In re Michie, 116 Fed. 752; In re Knickerbocker, 121 Fed. 1005; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293.

a conveyance by the bankrupt cannot be obtained by such process.¹⁷ But where the holding is not adverse as where held as agent or bailee, summary process may issue,¹⁸ and it has issued against the vendee of a general assignee when necessary to preserve the bankrupts estate.¹⁹ This rule is apparently unaffected by the provisions of the above section allowing a plenary suit in certain cases whether the defendant consents or not. The court of bankruptcy may also by summary process compel the return of property taken from one of its officers, by a State court¹ and may enjoin an action of replevin brought by such court against the trustee.² It may require also the sheriff to pay money collected on an execution invalidated by the bankruptcy proceedings, to the trustee.³ Where a bankruptcy court rejected a claim on reconsideration and ordered the claimant to refund dividend received such order was held not to be a suit within the meaning of the section.⁴

§ 2203. Jurisdiction of suits for recovery of property fraudulently conveyed, etc.

For the purpose of such recovery [i. e. of property fraudulently conveyed, assigned or encumbered] any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Part of clause e of § 67 and § 70, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 16, 32 Stat. 800, U. S. Comp. Stat. 1905, p. 690,

See notes to preceding section.

§ 2204. Extent of circuit court's jurisdiction.

The United States circuits courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Clause a of § 23, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3431.

¹⁷In re Michie, 116 Fed. 752.

see also In re Gutman, 114 Fed. 1009.

¹⁸Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; In re Knickerbocker, 121 Fed. 1006.

²In re Russel, 101 Fed. 248, 41 C. A. 323.

¹⁹Bryan v. Beonheimer, 181 U. S. 197, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; see also in re Rochford, 124 Fed. 186.

³Clarke v. Larremore, 188 U. S. 486; 47 L. ed. 555, 23 Sup. Ct. Rep. 363; see also, In re Knickerbocker, 121 Fed. 1005.

⁴Pirie v. Chicago Title Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; Rep. 906.

The requisites to the jurisdiction of circuit courts have already been fully discussed.⁸ Diversity of citizenship is necessary no Federal questions being involved, and a circuit court cannot consider a bill in equity brought by the trustee to set aside a conveyance by the bankrupt, the parties all being citizens of the same State.⁹ Under the law of 1867 the jurisdiction of the circuit court over the cases mentioned in this section was concurrent with that of the district court.¹⁰

§ 2205. — concurrent jurisdiction of offenses.

The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Clause c of § 23. act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3431.

This provision does not apply to civil actions but solely to crimes described in § 29 of the Bankruptcy act.¹⁴

§ 2206. Supreme Court to prescribe rules, forms and orders.

All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 30 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3434.

Pursuant to this provision the Supreme Court promulgated thirty-six orders in bankruptcy which are embodied in this and the following chapters,¹⁶ and sixty-three forms which are to be found in the appendix.

§ 2207. Proceedings to conform to practice in equity or at law as case may be.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process for appearance and pleading,

⁸Post, §§ 129 et. seq.

⁹Goodier v. Barnes, 94 Fed. 798.

¹⁰See Lathrop v. Drake, 91 U. S. 518, 23 L. ed. 414; Clafin v. Houseman, 93 U. S. 130, 23 L. ed. 833.

¹⁴Goodier v. Barnes, 94 Fed. 798.

¹⁶See post, § 2216, note, where the promulgation order is quoted.

and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing

Thirty-seventh order in bankruptcy in effect Jan. 2, 1899.

§ 2208. Prescribed forms to be followed.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

Thirty-eighth order in bankruptcy in effect Jan. 2, 1899.

§ 2209. Designation of newspapers for publication of notices.

Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 28 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3433.

§ 2210. Mode in which time is to be computed.

Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 31 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3434.

§ 2211. Oaths and affirmations.

a. Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b. Any person conscientiously opposed to taking an oath may, in

lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

§ 20 of act July 1, 1898, c. 541, 30 Stat. 551, 552, U. S. Comp. Stat. 1901, p. 3430.

While in strict equity practice an affidavit is defective if taken before an officer who is the affiant's attorney in the particular litigation,³ the fact that such officer subsequently becomes the affiant's attorney is no ground for objection thereto.⁴ Oaths may be administered by the referee to a witness whether appearing voluntarily or under compulsory process to give testimony in support of creditors claims.⁵

§ 2212. Duties of clerk.

Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fees paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if, the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

§ 51 of act July 1, 1898, c. 541, 30 Stat. 558, U. S. Comp. Stat. 1901, p. 3440.

The collection of the above mentioned fees is said to be a "condition precedent to filing a petition."⁷ But where the petition has been filed without such payment, and an adjudication had, a discharge will not be granted until payment is made.⁸ If members of a firm seek discharge from their individual liabilities, as well as those of the firm, distinct cases are apparently presented and fees may be charged for each.⁹ The affidavit of a voluntary bankrupt as to inability to pay fees in *prima facie*¹⁰ and not

³In re Kindt, 98 Fed. 403, and see In re Nebe, 11 U. B. R. 289, Fed. Cas. No. 10,073.

⁴In re Kindt, 98 Fed. 403.

⁵United States v. Simon, 146 Fed. 91.

⁷In re Barden, 101 Fed. 553.

⁸See In re Barden, 101 Fed. 553.

⁹In re Farley, 115 Fed. 361; In re Barden, 101 Fed. 553; but see In re Langslow, 98 Fed. 869.

¹⁰In re Levy, 101 Fed. 247.

conclusive.¹¹ It is held that the bankrupt cannot be compelled to pay the fees from exempt property or from money earned after the filing.¹²

§ 2213. Duty of clerks as to indexes and certificates.

The clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

§ 71 of act July 1, 1898, added Feb. 5, 1903, c. 487, § 17, 32 Stat. 800, U. S. Comp. Stat. 1905, p. 691.

§ 2214. Compensation of clerks.

Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

Clause a of § 52, act July 1, 1898, c. 541, 30 Stat. 559, U. S. Comp. Stat. 1901, p. 3441.

§ 2215. — what covered thereby.

The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

First clause of 35th order in bankruptcy in effect Jan. 2, 1899.

§ 2216. Bankruptcy docket.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action

¹¹In re Collier, 93 Fed. 191.

¹²Sellers v. Bell, 94 Fed. 817, 36 C. C. A. 502.

of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

First order in bankruptcy, in force Jan. 2, 1899.

The Supreme Court in promulgating the orders in bankruptcy declared as follows:—

"In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court."

§ 2217. Filing and endorsement of papers.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

Second order in bankruptcy in force Jan. 2, 1899.

§ 2218. Process—blanks furnished referees.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application be furnished to the referees.

Third order in bankruptcy in force Jan. 2, 1899.

§ 2219. Conduct of proceedings in person or by attorney—endorsements—service on attorney.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor;

but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

Fourth order in bankruptcy in force, Jan. 2, 1899.

§ 2220. Duty to advance money or indemnify for expenses—re-payment out of estate.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

Tenth order in bankruptcy in force, Jan. 2, 1899.

§ 2221. — order as to payment of fees after filing of petition.

In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

Clause 4 of 35th order in bankruptcy, as amended Dec. 11, 1905.²⁰

§ 2222. Marshal's fees in bankruptcy.

Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Clause b of § 52, act July 1, 1898, c. 541, 30 Stat. 559, U. S. Comp. Stat. 1901, p. 3441.

A marshal appointed to take charge of the bankrupt's property is entitled to a reasonable compensation for his services besides costs and expenses.²

§ 2223. Marshal to return sworn accounts of actual and necessary expenses.

The marshal shall make return under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for the custody of property and other services, and other actual and necessary expenses paid by him with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

Nineteenth order in bankruptcy in force Jan. 2, 1899.

§ 2224. Duty of Attorney General as to bankruptcy statistics.

The Attorney General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 53 of act July 1, 1898, c. 541, 30 Stat. 559, U. S. Comp. Stat. 1901, p. 3441.

§ 2225. Duty of officers to transmit statistics.

Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney General,

²In re Adams etc. Co. 101 Fed. 215;
and see In re Scott, 99 Fed. 404.

for statistical purposes, within ten days after being requested by him so to do.

§ 54 of act July 1, 1898, c. 541, 30 Stat. 559, U. S. Comp. Stat. 1901, p. 3441.

§ 2226. Who may become bankrupts—voluntary.

Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

§ 4 a, of act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3423.

While the section applies in terms to "any person" infants are not within its meaning since infants debts are usually voidable.⁶ The term "debt" is defined by the Bankruptcy act as "any debt, demand or claim provable in bankruptcy."⁷

§ 2227. — involuntary.

Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company,^[a] and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act.^[b] Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such from any liability under the laws of any State or Territory or of the United States.

§ 4 b, of act July 1, 1898, as amended, Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, U. S. Comp. Stat. 1905, p. 683.

[a] Natural persons.

The above amendment consisted in the addition of the last paragraph and an adding of the word "mining" after the word "publishing." Prior thereto mining corporations were not considered subject to adjudication in bankruptcy.¹⁰

⁶In re Duguid, 100 Fed. 277; see also in re Eidemiller, 105 Fed. 595. As to insanity of bankrupt, see post, § 2229.

⁷Bankruptcy act, § 1, clause 10.

¹⁰In re Woodside Coal Co. 105 Fed. 56, and cases cited; In re Keystone Coal Co. 109 Fed. 872; post note [b].

Under the above provisions no natural person who is a wage earner or engaged chiefly in farming or the tillage of the soil may be adjudged an involuntary bankrupt.¹¹ To come within the exception the party petitioned against need not be engaged solely in farming¹² nor need he till the soil in person¹³ but unless it is his chief occupation he is not exempt.¹⁴ In determining the "chief occupation" each case must be decided on its own circumstances.¹⁵ A corporation engaged chiefly in farming does not come within the exception.¹⁶ A wage earner is defined by the Bankruptcy act to be "an individual who works for wages, salary or hire at a rate of compensation not exceeding one thousand five hundred dollars per year."¹⁷ Whether or not a party is a wage earner is a question to be determined under the particular facts of each case.¹⁸ The presumption being against jurisdiction it must clearly appear that the exception is inapplicable.¹⁹ The better practice is to negative the above exceptions in the petition²⁰ and a petition failing to contain such negative has been held demurrable.¹ The section has reference to the occupation of the bankrupt at the time the alleged act of bankruptcy was committed and a farmer is within the exemption granted by act, although he has sold his farm prior to the filing of the petition.²

[b] Corporations.

Where the petition is filed against a corporation it should allege that the corporation was engaged in one of the businesses enumerated and the burden of proof is on the petitioning creditor.⁶ The section should be strictly construed.⁷ Under its provisions the following corporations have been held exempt from involuntary adjudications as not being within the terms of the act: ice companies,⁸ corporations engaged in keeping an inn or hotel,⁹ an irrigation company,¹⁰ an insurance corporation,¹¹ a

¹¹In re Taylor, 102 Fed. 728, 42 C. C. A. 1.

¹²Couts v. Townsend, 126 Fed. 249; see In re Hoy, 137 Fed. 175; Wulbern v. Drake, 120 Fed. 493, 56 C. C. A. 643.

¹³Bank v. Matney, 132 Fed. 75.

¹⁴In re Brown, 132 Fed. 706; Bank v. Matney, 132 Fed. 75.

¹⁵In re Mackey, 110 Fed. 355.

¹⁶In re Lake Jackson etc. Co. 129 Fed. 640.

¹⁷§ 1, act July 1, 1898, cl. 27, 30 Stat. 545, U. S. Comp. Stat. 1901, p. 3420.

¹⁸See In re Yoder, 127 Fed. 895.

¹⁹In re Pilger, 118 Fed. 206.

²⁰In re Bellah, 116 Fed. 69; see also In re Pilger, 118 Fed. 206; see post, § 2269.

¹In re Taylor, 102 Fed. 728, 42 C. C. A. 1.

²Fleckenger v. Bank, 145 Fed. 165, (C. C. A.)

⁶In re Chicago etc. Co. 104 Fed. 67.

⁷In re New York etc. Ice Lines, 147 Fed. 215, (C. C. A.)

⁸In re New York etc. Ice Lines, 147 Fed. 214, (C. C. A.); see however National Bank v. Ice Co. where the business was purchasing and selling ice.

⁹In re United States Hotel Co. 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588, but see In re San Gabriel etc. Co. 95 Fed. 271, where a sanitarium was held to be within the meaning of the act. This decision however has been questioned, see In re White Star etc. Co. 117 Fed. 571.

¹⁰In re Bay City Irr. Co. 135 Fed. 850; see also In re New York etc. Water Co. 98 Fed. 711.

¹¹In re Cameron etc. Ins. Co. 96 Fed. 576.

laundry corporation¹² an incorporated social club,¹³ a bridge building corporation having no manufacturing plant.¹⁴ It is held also that a corporation is not within the act which, although having power to engage in mercantile pursuits, has never in fact done so¹⁵ or one which in engaging in mercantile pursuits has exceeded its powers.¹⁶

§ 2228. — partnerships.

A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

Clause a of § 5, act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3424.

This clause expressly provides that a partnership may be adjudged a bankrupt being different from the earlier act of 1867¹ which allowed an adjudication against "two or more persons who were partners." This distinction has given rise to the doctrine of the entity of a partnership as distinct from its individual members.² Hence it is held that a partnership is subject to adjudication, its property being insufficient to pay its debts, regardless of the individual property of the partners,³ and that an adjudication of its individual members is not an adjudication of the partnership,⁴ the latter being necessary to an effective discharge of the partnership obligations.⁵ The entity doctrine has been extended even to the charging of separate fees for partnership and individual adjudications.⁶ Where however both the firm and the individual members make an assignment, this is an act of bankruptcy committed by all and the adjudication should embrace both the firm and the individuals.⁷ But where there have been no acts of bankruptcy by the individuals, all proceedings relating to the partnership, no individual adjudications and discharges may be had.⁸

§ 2229. Death or insanity of bankrupt not to abate proceedings.

The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the

¹²In re White Star etc. Co. 117 Fed. 571.

¹³In re Fulton Club, 113 Fed. 997.

¹⁴Butt v. Construction Co. 140 Fed. 840, (C. C. A.)

¹⁵In re Tontine etc. Co. 116 Fed. 401; In re New York etc. Co. 98 Fed. 711.

¹⁶In re Quimby etc. Co. 121 Fed. 139.

¹§ 36, c. 176, 14 Stat. 534.

²In re Mercur, 122 Fed. 388, 58 C. A. 472; In re McMurtrey, 142 Fed. 854.

³In re McMurtrey, 142 Fed. 855; Pincus, 147 Fed. 621.

see also In re Dunnigan, 95 Fed. 428; see however, In re Forbes, 128 Fed. 139, holding that a partnership cannot be declared insolvent without the insolvency of its individual members.

⁴In re Mercur, 122 Fed. 388, 58 C. A. 472.

⁵In re Meyers, 96 Fed. 408.

⁶In re Barden, 101 Fed. 555; In re Farley, 115 Fed. 361; but see contra. In re Gay, 98 Fed. 870.

⁷Green River etc. Bank v. Craig, 110 Fed. 137.

⁸In re Hale, 107 Fed. 432; In re

same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow or children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupts residence.

§ 8, act July 1, 1898, c. 541, 30 Stat. 549, U. S. Comp. Stat. 1901 p. 3425.

This section provides for cases wherein proceedings in bankruptcy are commenced during the lifetime of the party or at a time preceding his becoming insane and its meaning is that where jurisdiction has rightfully attached proceedings shall not abate by reason of subsequent death or insanity.¹¹ But where the party has been adjudged insane prior to the bankruptcy proceedings the court will not take jurisdiction.¹² The section applies to a corporation that "seeks by suicide to defeat properly instituted proceedings in bankruptcy."¹³ An alleged bankrupt dying after the petition has been filed but before service upon him, the heirs and personal representatives should be brought in.¹⁴

§ 2230. Duties of bankrupt.

The bankrupt shall, (1) attend the first meeting of his creditors if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs and claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustees transfers of all his property in foreign countries; (6) immediately inform his trustee, of any attempt, by his creditors or other persons to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee . . .

Part of § 7, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3425.

The remaining provisions of the above section, dealing with the filing of property schedules by the bankrupt and his examination and attendance are set forth elsewhere.¹⁵

¹¹In re Funk, 101 Fed. 245; In re Spaulding, 134 Fed. 507.

¹²In re Funk, 101 Fed. 245.

¹³Scheuer v. Smith etc. Co. 112 Fed. 407, 50 C. C. A. 312.

¹⁴Shute v. Patterson, 147 Fed. 512, (C. C. A.)

¹⁵See post, §§ 2271, 2295, 2296.

CHAPTER 64.

REFEREES AND TRUSTEES.

- § 2234. Offices of referee and trustee created.
- § 2235. Appointment, removal and districts of referees.
- § 2236. Qualifications of referees.
- § 2237. Oaths of office.
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- § 2255. Trustee not appointed in certain cases.
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- § 2257. —papers and accounts open to inspection.
- § 2258. Various provisions as to bonds of referees and trustees.
- § 2259. Additional compensation to referees and trustees forbidden.

§ 2234. Offices of referee and trustee created.

The offices of referee and trustee are hereby created.

§ 33, act July 1, 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, p. 3435.

§ 2235. Appointment, removal and districts of referees.

Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate,

and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Clause a, § 34, act July 1, 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, p. 3435.

§ 2236. Qualifications of referees.

Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Clause a § 35, act July 1, 1898, c. 541, 30 Stat.; 555, U. S. Comp. Stat. 1901, p. 3435.

§ 2237. Oaths of office.

Referees shall take the same oath of office as that prescribed for judges of the United States courts.

Clause A, § 36, act July 1, 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, p. 3435.

§ 2238. Number of referees.

Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Clause a, § 37, act July 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, p. 3435.

§ 2239. — jurisdiction.

Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bank-

ruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

§ 38, act July 1, 1898, c. 541, 30 Stat. 555, U. S. Comp. Stat. 1901, pp. 3435, 3436.

The relation of referees to the court corresponds in many respects to that of master in chancery.¹ They are judicial officers, and their orders are entitled to the respect and credit due orders of such officers.² A case being referred generally he has all the powers of the court relative to the examination of witnesses.³ Under this section a referee may consider all petitions referred to him, make adjudication thereon or dismiss them. He may require an amendment of petition and schedule,⁴ take the evidence and report on the questions presented,⁵ appoint appraisers to value the estate and order a sale thereof.⁶ The practice, however, is not to order such sale until after adjudication,⁷ and the order is subject in all cases to review by the court,⁸ every action of the referee being subject to such review.⁹ He may order the bankrupt to surrender assets to the trustee and make a similar order against a third person holding without color of right;¹⁰ he may appoint a receiver, his authority to make the appointment dating from the time the order of reference was placed in his

¹In re Covington, 110 Fed. 143.

²In re Romine, 138 Fed. 837; Clendenning v. Red River etc. Bank, 12 N. D. 51, 94 N. W. 901.

³In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161.

⁴In re Brumelkamp, 95 Fed. 814.

⁵Clark v. American Mfg. Co. 101 Fed. 962, 42 C. C. A. 120.

⁶In re Styer, 98 Fed. 290.

⁷In re Kelly etc. Co. 102 Fed. 747.

⁸In re Styer, 98 Fed. 290.

⁹See Clark v. American etc. Co. 101 Fed. 962, 42 C. C. A. 120; Brown v. Persons, 122 Fed. 212, 58 C. C. A. 658.

¹⁰Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

hands;¹¹ and it is held that he may also appoint a trustee under certain circumstances the creditors being unable to agree.¹² Subdivision 3 above refers in terms to the power of the judge and does not restrict subdivision 4, but is the correlative of § 69a, which authorizes a judge upon proof of specified facts to issue a warrant for the seizure of the bankrupt's property.¹³ A referee has no power to decide an application for a composition¹⁴ or for a discharge,¹⁵ but the matter may be referred to him to ascertain and report the facts.¹⁶ Neither has he power to issue subpoenas¹⁷ or to pay out funds belonging to the estate.¹⁸ Under section 5, above, a stenographer may be allowed at the expense of the estate.¹⁹ While a referee has not power to punish for contempt it is his duty to set forth the contempt upon his record certifying the facts to the judge who will deal with the question as if it had originally arisen in his court.²⁰ Provisions as to the taking of testimony before the referee, orders of the referee and the review thereof by the judge are set forth elsewhere.¹

§ 2240. — duties.

a. Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their finding therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupt fail, refuse or neglect to do so; (7) safely keep, perfect and transmit to the clerks, the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceed-

¹¹In re Floreken, 107 Fed. 241.

¹²In re Kuffler, 97 Fed. 187.

¹³In re Floreken, 107 Fed. 241.

¹⁴Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761.

¹⁵In re McDuff, 101 Fed. 241, 41 C. C. A. 316.

¹⁶General Order No. 12, § 3, post § 2340; Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761; In re McDuff, 101

Fed. 241; 41 C. C. A. 316; In re Kaiser, 99 Fed. 689.

¹⁷In re Pierce, 111 Fed. 516.

¹⁸In re Cobb, 112 Fed. 655.

¹⁹In re Razinsky, 101 Fed. 229.

²⁰In re Romine, 138 Fed. 841, and cases cited; acts constituting contempt are set forth in a following section, post § 2335.

¹Post, §§ 2350, 2342, 2343.

ing in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective officers are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys or counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly any property of an estate in bankruptcy.

§ 39, act July 1, 1898, c. 541, 30 Stat. 555, 556, U. S. Comp. Stat. 1901, p. 3436.

The fact that a referee is a debtor of the bankrupt does not make him an interested party,⁵ nor does the fact that he receives a commission on the amount disbursed.⁶ The interest which will disqualify is an interest in the proceedings in bankruptcy or in the estate of the bankrupt.⁷

§ 2241. — compensation.

Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a party of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

Clause a, of § 40, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 9, 32 Stat. 799, U. S. Comp. Stat. 1905, p. 687.

The compensation above set forth cannot be increased or diminished¹⁰ It is in full for the referee's services, hence a referee cannot charge a per diem fee,¹¹ nor an attorney's fee where he acts as attorney.¹² The com-

⁵Bray v. Cobb, 91 Fed. 102.

⁶In re Abbey Press, 134 Fed. 55, 67

C. C. A. 161.

⁷Bray v. Cobb, 91 Fed. 102.

¹⁰See In re Barber, 97 Fed. 547.

¹¹In re Pierce, 111 Fed. 516.

¹²In re Felson, 139 Fed. 275.

mission is upon the amount paid to the creditors, not upon the amount collected.¹³ It is not chargeable upon money paid on secured claims,¹⁴ nor upon money paid mortgagees arising from sale of mortgaged proper,¹⁵ nor upon the value of a homestead exemption which is set aside.¹⁶

§ 2242. — what covered thereby.

The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

2nd clause of 35th order in bankruptcy in effect Jan. 2, 1899.

This provision does not give the referee any compensation other than that allowed him by the preceding section.¹

§ 2243. — accounts and monthly return thereof.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

26th order in bankruptcy in effect Jan. 2, 1899.

§ 2244. — effect of vacancy or disability.

Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 43 of act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438.

§ 2245. —appointment of trustees.

The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office

¹³In re Abby Press, 134 Fed. 55, 67 C. C. A. 161; In re Barker, 111 Fed. 501. ¹⁵In re Utt, 105 Fed. 754, 45 C. C. A. 32.

¹⁴In re F. Wayne etc. Co. 94 Fed. 109. ¹⁶In re Gardiner, 103 Fed. 922.

¹See In re Troth, 104 Fed. 291.

of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 44 of act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438.

The requirement that a trustee be elected at the first meeting is directory only,⁴ so upon such failure to elect the creditors are entitled to a reasonable adjournment.⁵ Where they cannot agree a trustee may be appointed by the referee,⁶ subject to the court's approval,⁷ or by the court,⁸ and lapse of time does not affect the power of the court in this respect.⁹ Selection having been made by the creditors it is subject to the approval of the referee or judge,¹⁰ but it will not be interfered with unless it clearly imperils the fair administration of the estate.¹¹ So a different trustee cannot be appointed by the referee merely because he disapproves of the creditors' selection.¹² Removal of a trustee has been granted where by false representations he affects a composition to the detriment of the creditors.¹³ Where a vacancy occurs it cannot be filled by the court or referee unless the creditors fail to make a selection.¹⁴ Under the terms of General Order No. 15, a trustee need not be appointed where there are no assets.¹⁵

§ 2246. — powers of judge and referee as to approval and removal.

The appointment of a trustee by the creditors shall be subject and be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

13th order in bankruptcy in force Jan. 2, 1899.

See note to preceding section.

§ 2247. — qualifications.

Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) cor-

⁴See *In re Fisher & Co.* 135 Fed. 223.

⁵*In re Nice*, 123 Fed. 987.

⁶See *In re Machin*, 128 Fed. 316.

⁷See *In re Brooke*, 100 Fed. 432.

⁸*Clark v. Pidcock*, 129 Fed. 750.

⁹See *Clark v. Pidcock*, 129 Fed. 749.

¹⁰*In re Kenney*, 136 Fed. 451; see post, § 2246.

¹¹*In re Blue Ridge, etc. Co.* 125 Fed. 622.

¹²*In re Mangan*, 133 Fed. 1000; *In re MacKeller*, 116 Fed. 547.

¹³*In re Wrisley Co.* 133 Fed. 388.

¹⁴*In re Lewensohn*, 98 Fed. 576;

In re Fisher & Co. 135 Fed. 225.

¹⁵Post, § 2254.

porations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 45 of act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438.

§ 2248. — death or removal.

The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 46 of act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438.

As a general rule a successor of a deceased trustee will be appointed only when necessary to the administration of the estate.¹⁹ The power of removal for cause is given to the court by § 2 (17) of the Bankruptcy act.²⁰

§ 2249. Trustee's duties.

a. Trustees shall respectively (1) account for and pay over to the estates in their control all interest received by them on property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition

¹⁹See *In re Haskell's Estate*, 134 Fed. 309.

²⁰*Ante*, § 2200.

of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c. The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

§ 47, act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438, as amended Feb. 5, 1903, c. 487, § 10, 32 Stat. 799, U. S. Comp. Stat. 1905, p. 687.

The amendment of 1903 consisted in adding clause c. The trustee stands in the place of the creditors of the bankrupt and has the same rights and remedies as they would have had, had there been no adjudication.³ Thus he may sue in equity to recover a preferential payment.⁴ He may collect and reduce to money the property of the estate. This includes all property not exempt, which may be made available.⁵ General Order No. 29 provides for the method of payment of the money collected.⁶

§ 2250. — preparation of inventory, accounts, etc.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act with the estimated value of each article, and any creditor may take ex-

³Norcross v. Nathan, 99 Fed. 414. 903, and cases cited; In re Standard

⁴Parker v. Black, 143 Fed. 560. etc. Co. 116 Fed. 476, 53 C. C. A. 644.

⁵In re Baudonine, 96 Fed. 536; as to sales by trustee see, In re San Gabriel etc. Co. 102 Fed. 310, 42 C. A. 369; In re Pittelkow, 92 Fed. § 2202.

ceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

17th order in bankruptcy in force Jan. 2, 1899.

§ 2251. — as to partnership accounts.

The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

Clause d, § 5, act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3424.

§ 2252. — compensation.

a. Trustees shall receive for their services, payable after they are rendered a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one half of one per centum of the amount to be paid the creditors on such composition.

b. In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall ap-

portion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c. The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

§ 48, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 11, 32 Stat. 799, U. S. Comp. Stat. 1905, p. 688.

The amendment above mentioned made substantial changes in subdivision a, as to the amount of the trustee's commissions. As originally enacted the trustees were allowed commissions "on sums to be paid as dividends and commissions." Hence they could not charge on the gross sum coming into their possession.¹⁰ Neither could they charge commission on money which never became a part of the bankrupt estate,¹¹ nor on money paid to mortgagees,¹² nor on money paid on secured claims,¹³ since such sums are not dividends. Under the above amendment they are allowed commissions "on all money disbursed by them." This would seem to allow commissions on sums other than "dividends and commissions" as limited under the original act.¹⁴ But they can charge only on money paid and not on the payment of property in specie.¹⁵ It is held that all commissions should be paid out of the bankrupt estate,¹⁶ but secured creditors have been held liable to contribute their proportion of the commissions and other costs where they make use of the bankruptcy court and its officers to realize on their security.¹⁷

§ 2253. — what covered thereby.

The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

3rd clause of 35th order in bankruptcy in effect Jan. 2, 1899.

The compensation allowed a trustee being in full for his services he is not entitled to additional compensation for legal services performed¹⁸ or for extra time and attention given.¹⁹

¹⁰In re Barker, 111 Fed. 501.

¹¹In re Kaiser, 112 Fed. 955.

¹²In re Utt, 105 Fed. 754, 45 C. C. A. 32.

¹³In re Utt, 105 Fed. 754, 45 C. C. A. 32; In re Mammoth etc. Co. 116 Fed. 731; but see In re Barber, 97 Fed. 547.

¹⁴See In re Anders etc Co. 136 Fed. 995.

¹⁵In re Lumber Co. 136 Fed. 986.

¹⁶In re Anders, 136 Fed. 995.

¹⁷In re Alison Lumber Co. 137 Fed. 643; but see In re Anders, 136 Fed. 995.

¹⁸In re McKenna, 137 Fed. 611; In re Halbert Co. 134 Fed. 236. 67 C. C. A. 18.

¹⁹In re Epstein, 109 Fed. 878; In re Carolina etc. Co. 96 Fed. 950.

§ 2254. No official or general trustee.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

14th order in bankruptcy in force Jan. 2, 1899.

§ 2255. Trustee not appointed in certain cases.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

15th order in bankruptcy in force Jan. 2, 1899.

No trustee will be appointed where the schedule discloses no assets.³ But an appointment may be made subsequently if assets are discovered.⁴

§ 2256. Notice to trustee of his appointment.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

16th order in bankruptcy in force Jan. 2, 1899.

§ 2257. — papers and accounts open to inspection.

The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

§ 49 of act July 1, 1898, c. 541, 30 Stat. 558, U. S. Comp. Stat. 1901, p. 3439.

§ 2258. Various provisions as to bonds of referees and trustees.

a. Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectfully qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as

³In re Eagles, 99 Fed. 695.

⁴In re Smith, 93 Fed. 791.

shall be approved by such courts, conditioned for the faithful performance of their official duties.

b. Trustees, before entering upon the performance of their official duties and within ten days after their appointment, or within such further time not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c. The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustees, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d. The court shall require evidence as to the actual value of the property of sureties.

e. There shall be at least two sureties upon each bond.

f. The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g. Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h. Bonds of referees, trustees and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i. Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j. Joint trustees may give joint or several bonds.

k. If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l. Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m. Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

§ 50 of act July 1, 1898, c. 541, 30 Stat. 558, U. S. Comp. Stat. 1901, p. 3439.

§ 2259. Additional compensation to referees and trustees forbidden.

That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.

§ 72, act July 1, 1898, c. 541, added Feb. 5, 1903, c. 487, § 18, 32 Stat. 800, U. S. Comp. Stat. 1905, p. 691.

A previous section prescribes what is covered by the trustee's compensation.¹⁰

¹⁰ Ante, § 2252.

CHAPTER 65.

PETITION AND ADJUDICATION.

- § 2269. Petition to be in duplicate.
- § 2270. —plainly printed or written—abbreviations and interlineations.
- § 2271. Schedules of bankrupt property to be filed.
- § 2272. Amendment of petition and schedules.
- § 2273. No dismissal of petition without notice to creditors.
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- § 2276. —proceedings where petition by less than three creditors controverted.
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- § 2278. Service and return day of process in involuntary bankruptcy.
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- § 2280. —other creditors may join or oppose petition.
- § 2281. —pleadings to be verified.
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- § 2285. —issues and hearing.
- § 2286. —references to referee by clerk if judge absent.
- § 2287. —adjudication on default.
- § 2288. Right to jury trial if demanded.
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- § 2290. —general provisions as to right to jury apply.
- § 2291. Filing of schedule in involuntary bankruptcy.
- § 2292. Costs in contested adjudications.
- § 2293. Voluntary petition—hearing and reference.
- § 2294. Right of partner to resist voluntary petition by partnership.
- § 2295. Bankrupt to submit to examination—exemption from criminal prosecution.
- § 2296. —when required to attend—actual expenses when paid.

§ 2269. Petition to be in duplicate.

Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.^{[a]-[b]}

Clause c, of § 59, act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

[a] Petition to be in duplicate.

This provision means that one petition in the form of two duplicate originals shall be filed,¹ and where only one original is filed within the prescribed time the court has no authority to allow the filing of the other thereafter.² The petition should be filed with the clerk and not sent directly to the judge.³ It is deemed "filed" when personally delivered to the clerk and received by him for the purpose of being kept on file, though not at his office nor during office hours;⁴ and it is his duty to receive and file it, although there is a vacancy in the office of the district judge.⁵ The objection that the petitioner failed to file a duplicate copy is waived by an answer within the prescribed time.⁶

[b] Involuntary petition—what to contain.

In involuntary proceedings the petition should be filed within four months of the commission of the act of bankruptcy.⁹ So, a petition filed more than four months after the recording of a preferential transfer is too late.¹⁰ In the eastern district of North Carolina printed forms are prescribed and the court will not consider petitions unless so made out.¹¹ This rule, however, is apparently in conflict with the following section. The procedure where two or more petitions are filed against the same debtor, in different districts, is set forth in a following section.¹² The petition must state the nature of the petitioner's claims,¹³ and must show that the bankrupt is not one of the excepted class,¹⁴ either by a direct negative averment or by a positive statement as to his business,¹⁵ and the petition is demurrable if such fact does not appear,¹⁶ but may be cured by amendment.¹⁷ It must allege that the defendant owes debts to the amount of at least one thousand dollars,¹⁸ and the omission of such allegation leaves the court without jurisdiction.¹⁹ Allegations as to acts of bankruptcy should be stated with reasonable and sufficient certainty,²⁰ the petitioners being bound to make as full disclosures as their information will permit.¹ Thus the specific act relied upon should be stated,

¹In re Stevenson, 94 Fed. 116.

²In re Dupree, 97 Fed. 28.

³In re Sykes, 106 Fed. 669.

⁴In re Von Borcke, 94 Fed. 352.

⁵In re Urban etc. Co. 132 Fed. 140.

⁶In re Plymouth etc. Co. 135 Fed. 1000, 68 C. C. A. 434.

⁹See § 3 (5) b, Banker Act, 1898; see also *Rex Buggy Co. v. Hearick*, 132 Fed. 310.

¹⁰See *In re Bogen*, 134 Fed. 1019.

¹¹*Mahoney v. Ward*, 100 Fed. 278.

¹²Post, § 2283.

¹³*In re White*, 135 Fed. 201.

¹⁴See ante, § 2226, 2227, as to who may become bankrupts, voluntary and involuntary.

¹⁵*In re White*, 135 Fed. 201; see also *In re Brett*, 130 Fed. 981; *In re Callison*, 130 Fed. 987; *In re Mero*, 128 Fed. 630; *Beach v. Grocery Co.* 120 Fed. 736, 57 C. C. A. 150; *Rise v. Bordner*, 140 Fed. 566.

¹⁶*In re Taylor*, 102 Fed. 728, 42 C. C. A. 1.

¹⁷*Beach v. Grocery Co.* 120 Fed. 736, 57 C. C. A. 150.

¹⁸*Taft Co. v. Bank*, 141 Fed. 369, (C. C. A.)

¹⁹*Taft Co. v. Bank*, 141 Fed. 369, (C. C. A.)

²⁰*In re Nelson*, 98 Fed. 76; *In re Cliffe*, 94 Fed. 354.

¹*In re Blumberg*, 133 Fed. 845.

with the time, place and circumstances,² and an allegation that property was transferred with intent to defraud creditors, should state the facts, showing such intent.³ If a preference is alleged the names of the preferred creditors should be set forth if known.⁴ A petition setting forth the act of bankruptcy in the statutory language only is apparently insufficient,⁵ as the bankrupt has a right to know what particular issue he will be expected to meet.⁶ It must appear also that the claims of the petitioners aggregate \$500 or over,⁷ and where it does not the court cannot allow an amendment joining other creditors to make up the deficit.⁸

§ 2270. — plainly printed or written—abbreviation and interlineations.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

Fifth order in bankruptcy in force Jan. 2, 1899.

§ 2271. Schedule of bankrupt property to be filed.

The bankrupt shall . . . prepare make oath to and file in court within ten days, unless further time is granted, after the adjudication, of an involuntary bankrupt, and with the petition of a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown that fact to be stated, the amount due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee and one for the trustee. . . .

Clause 8, § 7, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3425.

The form of schedule as prescribed by the Supreme Court is set forth in the appendix. All property should be scheduled.¹³ If exempt the exemption should be stated.¹⁴ The list of debts should be set forth, including partnership debts, where a firm member seeks discharge from

²See *Clark v. Henne*, 127 Fed. 288, 62 C. C. A. 172; *In re Nelson*, 98 Fed. 76.

³*In re White*, 135 Fed. 199.

⁴*In re Lackow*, 140 Fed. 573.

⁵*In re Hark*, 135 U. S. 605; but see *In re Bellah*, 116 Fed. 69.

⁶*In re Hark*, 135 Fed. 604.

⁷*In re Stein*, 130 Fed. 377; see also post, § 2275.

⁸*In re Stein*, 130 Fed. 377.

¹³*In re Becker*, 106 Fed. 54.

¹⁴*In re Bean*, 100 Fed. 262.

both individual and firm liability.¹⁶ Amendments are, however, liberally allowed.¹⁷ Under the ninth order in bankruptcy the petitioning creditor in involuntary cases shall file the schedule, where the bankrupt is absent or cannot be found.¹⁸

§ 2272. Amendment of petition and schedules.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petition shall state the cause of the error in the paper originally filed.

Eleventh order in bankruptcy in force Jan. 2, 1899.

Amendments may generally be made at any stage of the proceedings regardless of the time elapsed.² They are liberally allowed,³ the above order not restricting the general power of amendment vested in the court.⁴ The power to amend includes the correcting of the name of the alleged bankrupt.⁵ Amendments to a petition have been allowed after hearing alleging specific acts of bankruptcy, where the original petition only alleged bankruptcy generally.⁶ An amendment when filed takes effect as of the date of the original petition.⁷

§ 2273. No dismissal of petition without notice to creditors.

A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

Clause g, of § 59, act July 1, 1898, c. 541, 30 Stat. 562, U. S. Comp. Stat. 1901, p. 3445.

Notice of a proposed dismissal is essential,¹¹ and an order of dismissal without such notice is erroneous.¹² But it is not void, and in order to have it set aside application therefor must be made with reasonable diligence.¹³ A provision providing for ten days' notice to creditors of a pro-

¹⁶In re Monroe, 114 Fed. 398.

¹⁷See post, § 2272.

¹⁸Post, § 2291.

²In re Mercur, 122 Fed. 384, 58 C. C. A. 472, and see In re Ives, 113 Fed. 913, 51 C. C. A. 541.

³In re Royal, 112 Fed. 135.

⁴In re Bellah, 116 Fed. 69; Gleason v. Smith etc. Co. 145 Fed. 895, (C. C. A.)

⁵Gleason v. Smith etc. Co. 145 Fed. 895, (C. C. A.).

⁶Chicago etc. Co. v. Leather Co. 141 Fed. 520, (C. C. A.)

⁷In re Shoesmith, 135 Fed. 688, 68 C. C. A. 322; Chicago etc. Co. v. Leather Co. 141 Fed. 520, (C. C. A.)

¹¹In re Plymouth etc. o. 135 Fed. 1000, 68 C. C. A. 434.

¹²Idem.

¹³In re Jemison etc. Co. 112 Fed. 966, 50 C. C. A. 641.

posed dismissal of proceedings is found elsewhere.¹⁴ It is held, however, that notice as above required is unnecessary except to the petitioning creditors, where the petition is involuntary and no list of creditors has been filed, no creditors have intervened and there is no reason to suspect collusion.¹⁵ It is held also that where the creditors have been notified of the pendency of the petition and have not appeared, a dismissal for want of sufficient petitioners will not be withheld until the clerk can notify such creditors.¹⁶

§ 2274. Who may file voluntary petitions.

Any qualified person may file a petition to be adjudged a voluntary bankrupt.

Clause a, of § 59, act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

The qualifications of a voluntary bankrupt are set forth in an earlier section.¹

§ 2275. What creditors may file involuntary petitions.

Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

Clause b, of § 59, act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

It is necessary that a party have a "provable claim" in order to be a petitioner.³ So a creditor who has assigned his claim cannot be considered,⁴ nor can a creditor, holding an unsurrendered preference,⁵ since a creditor cannot prove a claim until he has surrendered any preference he may have obtained.⁶ Nor can a party be considered as a creditor, who under an agreement between the debtor and a third party, must look to the latter for the satisfaction of his claim.⁷ But a person surrendering his preference may qualify.⁸ A claimant having an unliquidated demand may

¹⁴See post, § 2315.

¹⁵In re Levi, 142 Fed. 963, (C. C. A.)

¹⁶In re Trebelhorn, 137 Fed. 3, 69 C. C. A. 601.

¹Ante, § 2226.

³In re Rogers etc. Co. 102 Fed. 687.

⁴In re Burlington etc. Co. 109 Fed. 777.

⁵In Gillette, 104 Fed. 769; In re Rogers etc. Co. 102 Fed. 687; In re

Fishplate etc. Co. 125 Fed. 986; see however, In re Herzikopf, 118 Fed. 101.

⁶In re Strobel etc. Co. v. Knost, 99 Fed. 409; In re Conhaim, 97 Fed. 924; see also In re Rogers etc. Co. 102 Fed. 688; and see Bankruptcy act, § 57 g. post, § 2304.

⁷In re Blount, 142 Fed. 267.

⁸In re Vastbinder, 126 Fed. 417

and cases cited.

be a petitioner where it is "provable."⁹ But it is held that a party having an unliquidated demand in tort for damages cannot be a petitioner.¹⁰ Persons who procure the commission of an act of bankruptcy¹¹ as by actively asserting a claim and ratifying an assignment for benefit of creditors may be estopped from maintaining an involuntary petition thereon.¹² Where, however, the petitioners merely file their claims, in the matter of assignment, as required by State law,¹³ or where the participation in the assignment is involuntary,¹⁴ there is no estoppel. The question as to whether the number of creditors is less than twelve so as to entitle a single creditor to file a petition is to be determined as of the date of the petition.¹⁵ Creditors subsequently joining in the petition may be reckoned in making up the number of petitioners, and the amount of the claims required.¹⁶ So where the petition alleges less than twelve creditors, and there is only one petitioner, others may join to make up the requisite number where it appears that there were more than twelve creditors.¹⁷ Where, however, the petition fails to show the necessary number of petitioners and the requisite amount the court has no jurisdiction and hence cannot allow other creditors to come in.¹⁸ Parts of claims cannot be assigned in order to make up the necessary number of creditors where other creditors do not wish an adjudication.¹⁹

While a creditor misled may be permitted to withdraw from the petition,³ a withdrawal will be refused where a dismissal of the petition would result.⁴ No creditor can be compelled to be a petitioner against his will.⁵ The act nowhere requires that notice be given to the other creditors of the filing of an involuntary petition.⁶

§ 2276. — proceeding where petition by less than three creditors controverted.

If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and there-

⁹In re Stern, 116 Fed. 604, 54 C. C. A. 60; In re Shoe Co. 125 Fed. 576.

¹⁰In re Brinckman, 103 Fed. 65.

¹¹In re Marks etc. 135 Fed. 448, and see Lowenstein v. McShane, etc. Co. 130 Fed. 1007.

¹²Simonson v. Shinheimer, 95 Fed. 948, 37 C. C. A. 337; Durham etc. Co. v. Seaboard etc. Mills, 121 Fed. 179; see In re Romanow, 92 Fed. 510.

¹³See In re Curtis, 94 Fed. 630, 36 C. C. A. 430.

¹⁴See In re Salmon, 143 Fed. 406.

¹⁵In re Coburn, 126 Fed. 218.

¹⁶In re Romanow, 92 Fed. 510; In re Bedingfield, 96 Fed. 190; see § 2276, post; In re Ryan, 114 Fed. 373.

¹⁷In re Mercur, 95 Fed. 634.

¹⁸In re Stein, 130 Fed. 377; see ante, § 2271, note.

¹⁹In re Thread Independent 113 Fed. 998.

³In re Coburn, 126 Fed. 220; see also In re Heffron, 6 Biss. 156, Fed. Cas. No. 6,321; In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361.

⁴In re Bedingfield, 96 Fed. 190.

⁵In re Gillette, 104 Fed. 769.

⁶In re Billing, 145 Fed. 395.

upon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

Clause a, § 59 of act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

See notes to previous section.

§ 2277. — relatives excluded in computing number of creditors.

In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

Clause e, of § 59, act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

§ 2278. Service and return day of process in involuntary bankruptcy.

Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

Clause a of 18, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 6, 32 Stat. 798, U. S. Comp. Stat. 1905, p. 685.

The service of the petition and the subpoena is made in the same manner as in an equity suit, that is, by personal service on party, or by leaving a copy at his usual place of abode with some adult resident or members of the family,¹³ and where the latter form of service has been complied with it has been held sufficient without the publication as prescribed in the last clause of the section.¹⁴ When the alleged bankrupt was a hotel keeper service on the clerk was held sufficient,¹⁵ and where a foreign corporation, service was allowed on State commissioner of corporations duly appointed attorney to receive service.¹⁶ Additional notice by publication is advisable where the alleged bankrupt is a lunatic, although he is personally served,¹⁷ and his guardian should be included in the process.¹⁸ Where one member of a firm refuses to join in petition the proceeding becomes involuntary as to him and he must be served.¹⁹ An objection that a subpoena is improperly served can be raised only by motion or defense at the trial.²⁰ The fact that it was not served before the return day does not terminate the proceedings, the court having power to issue an alias subpoena.¹

§ 2279 — time when bankrupt or creditor to appear and plead.

The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

Clause b of § 18, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, § 6, 32 Stat. 798, 30 Stat. 551, U. S. Comp. Stat. 1905, p. 685.

The amendment above referred to consisted in changing the time for pleading to the petition from ten to five days. Such time is computed by excluding the first day and including the last.⁵ The provision is mandatory⁶ and on failure to plead by the last day the court may adjudicate or dismiss the petition.⁷ While the time may be extended by the court it cannot be extended by agreement between the counsel for the petitioning creditors and the bankrupt.⁸ Where the petition is insufficient on its face a demurrer may be filed,⁹ but the question of the sufficiency of an answer to a petition cannot be so raised,¹⁰ since equity practice is followed, and a demurrer to an answer is unknown to that court.¹¹ The petition-

¹³In re Risteen, 122 Fed. 733; see Equity rule 13, ante, § 971.

¹⁴In re Risteen, 122 Fed. 733.

¹⁵Idem.

¹⁶In re Magid-Hope Silk Mfg. Co. 110 Fed. 352.

¹⁷In re Burka, 107 Fed. 674.

¹⁸Idem.

¹⁹In re Murray, 96 Fed. 600.

²⁰In re Seaboard etc. Underwriters, 137 Fed. 987.

¹Gleason v. Smith etc. Co. 145 Fed. 895.

⁵§ 31 Bankruptcy act; Day v. Beck etc. Co. 114 Fed. 834, 52 C. C. A. 468.

⁶Day v. Beck etc. Co. 114 Fed. 834, 52 C. C. A. 468.

⁷Post, § 2287.

⁸In re Simonson, 92 Fed. 904.

⁹See In re Harper, 105 Fed. 900; and see Dressel v. Lumber Co. 107 Fed. 255.

¹⁰Goldman v. Smith, 93 Fed. 182.

¹¹Grether v. Wright, 75 Fed. 743, 23 C. C. A. 500.

ing creditors may, however, file a replication denying the allegations in the answer.¹²

§ 2280. — other creditors may join or oppose petition.

Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Clause b of § 59, act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3445.

As to appearance and joinder of other creditors to make up sufficiency of the number of petitioners and the amount, see ante, § 2275. The above provision does not authorize a creditor to appear and file an answer raising new issues where the time for pleading to the petition has expired and has not been extended and the petition has been heard.¹⁶

§ 2281. — pleadings to be verified.

All pleadings setting up matters of fact shall be verified under oath.

Clause c of § 18, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

While the pleadings setting up matters of fact must be verified, no formal affidavit is necessary.¹⁹ When the verification is by officers of a corporation, however, their authority must be set forth.²⁰ The petition may be verified by the attorneys of the creditors where they have full knowledge of the facts,¹ though it is held that it should be by the creditors when within their knowledge.² The verification of a voluntary petition by the bankrupt's attorney has been allowed when at the time he was not an attorney of record.³ In any event a defective verification is not jurisdictional and may be cured by amendment,⁴ and the defect is waived by plea and answer on the merits, even though the answer is not permitted to be filed.⁵

§ 2282. — proceedings where two petitions filed—priority and consolidation.

Whenever two or more petitions shall be filed by creditors against

¹²See *In re Tayler*, 102 Fed. 728, 42 C. C. A. 1.

¹⁶*In re Mutual etc. Agency*, 111 Fed. 152.

¹⁹*In re Bellah*, 116 Fed. 76.

²⁰*Idem*.

¹*In re Vastbinder*, 126 Fed. 418; *In re Chequasset Lumber Co.* 112 Fed. 56; see also *Lehigh etc. Co. v. Stengel*, 95 Fed. 641, 37 C. C. A. 210;

Green River etc. Bank v. Craig, 110 Fed. 137.

²*In re Nelson*, 98 Fed. 76.

³*In re Kindt*, 98 Fed. 403.

⁴*In re Simonson*, 92 Fed. 910; *In Chequasset Lumber Co.* 112 Fed. 56, *Green River etc. Bank v. Craig*, 110 Fed. 137.

⁵*Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337.

a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

Seventh order in bankruptcy in effect Jan. 2, 1899.

§ 2283. — petitions in different districts, priorities, amendments and transfers.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership, for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action

shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

Sixth order in bankruptcy in force Jan. 2, 1899.

§ 2284. — transfer and consolidation of cases.

In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

§ 32 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3434.

This section applies to petitions filed against partnerships as well as those against the members thereof.⁸ As to cases referred to in this section, the court first obtaining jurisdiction will hear and dispose of the case unless, in its discretion, it directs a transfer for the greater convenience of the parties.⁹

§ 2285. — issues and hearing.

If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition.

Clause d of § 18, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

The effect of a general appearance and joining issue on the merits is to waive all formal or modal defects,¹⁰ so objections as to the authentication of the petition are waived if not made at the time of taking issue and demanding a jury trial.¹¹ A jurisdictional objection must also be promptly taken advantage of or it is waived.¹² Issue being joined, the trial is without intervention of a jury except where a jury trial is given. Such trial is given where the question raised is as to the insolvency of the bankrupt

⁸In re Sears, 112 Fed. 58.

⁹In re Sears, 112 Fed. 58.

¹⁰See In re Cliffe, 94 Fed. 355; In re Worsham, 142 Fed. 121.

¹¹In re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8,912.

¹²In re Mason, 99 Fed. 256; see also In re Worsham, 142 Fed. 121, and cases cited.

or the commission of an act of bankruptcy.¹³ Involuntary bankruptcy proceedings are not changed into voluntary by failure of bankrupt appeal.¹⁴

§ 2286. —references to referee by clerk if judge absent.

If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Clause f of § 18, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

The clerk must refer the case under the above provision and it cannot be done by his deputy.¹⁷ A reference of an involuntary petition can be made under the above provision only where no issue has been raised on the petition by the bankrupt or a creditor.¹⁸

§ 2287. — adjudication on default.

If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

Clause e of § 18, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

This time within which pleadings are to be filed is mandatory and should be strictly observed.¹ So when not filed in time an adjudication may be made *pro confesso*,² which is as binding as if made after a hearing.³ In computing the time allowed the first day is excluded and the last included,⁴ and an adjudication made before the last day has expired is premature.⁵ A default adjudication being binding a petitioner cannot by motion to vacate the adjudication, obtain the benefit of an appeal or other revisory writ. Such adjudication can be assailed only for fraud in its procurement, or for want of jurisdiction apparent on the face of the proceedings.⁶

The petition to set aside an adjudication whether after a regular hearing or on default, may be made by the creditors who have provable claims or by the bankrupt,⁷ except in voluntary cases where it cannot be made

¹³Post, § 2288.

¹⁴In re Taylor, 102 Fed. 728, 42 C. C. A. 1.

¹⁷Bray v. Cobb, 91 Fed. 102.

¹⁸In re Humbert Co. 100 Fed. 439.

¹Bray v. Cobb, 91 Fed. 106.

²Idem.

³In re American etc. Co. 112 Fed.

752, 50 C. C. A. 517; see also In re Billing, 145 Fed. 395.

⁴§ 31 Bankruptcy act, U. S. Comp. Stat. 1901, p. 3434.

⁵Day v. Beck etc. Co. 114 Fed. 836, 52 C. C. A. 468.

⁶In re Billing, 145 Fed. 395.

⁷See In re Columbia etc. Co. 112 Fed. 643, 50 C. C. A. 406.

by a creditor, he having no right to contest the adjudication in the first place.⁸ It may, however, be opposed by any person affected by the adjudication and interested in sustaining it.⁹ Where the want of jurisdiction is the ground of the petition to set aside, the court may, in its discretion, consider the petition of a stranger to the proceedings.¹⁰ Each application to set aside must be considered on its own facts,¹¹ but it must be made reasonably, and has been refused when not made until after the lapse of eight months.¹²

§ 2288. Right to jury trial if demanded.

A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

Clause a of § 19, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

An alleged bankrupt is entitled to a jury trial only upon a question as to his insolvency,¹⁶ or the commission by him of an act of bankruptcy.¹⁷ Hence the contention that certain petitioners are not creditors cannot be so tried.¹⁸ While such trial is a matter of right,¹⁹ the demand therefor must be made in writing within the time within which an answer may be filed,²⁰ that is, within five days after the return day of the subpoena. The right to a jury trial can be demanded only by the bankrupt,¹ but where the petition is filed against a firm by one of the partners, the objecting partners are entitled to a jury trial on the question of the solvency of the partnership.² Failure to formally apply for a jury trial, as above provided, operates as a waiver of the right,³ and if the case is so tried the verdict is merely advisory.⁴

⁸In re Ives, 113 Fed. 914, 51 C. C. A. 541.

⁹In re Atlantic etc Co. 9 Ben. 280, Fed. Cas. No. 628.

¹⁰In re Columbia etc. Co. 101 Fed. 965.

¹¹In re Ives, 113 Fed. 911, 51 C. C. A. 441.

¹²Idem.

¹⁶Simonson v. Sinsheimer, 100 Fed. 426, 40 C. C. A. 474.

¹⁷Day v. Beck, 114 Fed. 834, 52 C. C. A. 468.

¹⁸Morss v. Franklin Coal Co. 125 Fed. 998.

¹⁹Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666.

²⁰See Bray v. Cobb, 91 Fed. 102.

¹In re Herzikopf, 121 Fed. 544, 57 C. C. A. 606.

²In re Forbes, 128 Fed. 137.

³In re Neasmith, 147 Fed. 163, (C. C. A.).

⁴In re Neasmith, 147 Fed. 163, (C. C. A.) and cases cited.

§ 2289. — proceeding if no jury in attendance.

If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Clause b of § 19, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3430.

§ 2290. — general provisions as to right to jury apply.

The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Clause c of § 19, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3430.

A person attempting to replevy property in possession of the trustee should bring suit in the bankruptcy court and is entitled to a jury trial under the above section.³

§ 2291. Filing of schedule in involuntary bankruptcy.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor, may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

Ninth order in bankruptcy in force Jan. 2, 1899.

§ 2292. Costs in contested adjudications.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a

³In re Russell, 101 Fed. 248, 41 C. C. A. 323.

bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

Thirty-fourth order in bankruptcy in effect Jan. 2, 1899.

Costs are discussed in another chapter of this Code.¹⁰

§ 2293. Voluntary petition—hearing and reference.

Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. . . . If the judge is absent from the district or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Clause g of § 18, act July 1, 1898, c. 541, 30 Stat. 551, U. S. Comp. Stat. 1901, p. 3429.

Upon the filing of a voluntary petition the creditors may obtain an order for the examination of the bankrupt,¹² but the act does not authorize them to contest the adjudication.¹³ Hence they cannot intervene to show that the petitioner is solvent.¹⁴ The right to an adjudication upon a voluntary petition during the pendency of an involuntary petition has been sanctioned both under the act of 1867¹⁵ and under the present act.¹⁶ The consideration guiding the court in such case should be the welfare of the estate.¹⁷ Hence if the effect of allowing a voluntary adjudication to stand is to cause property to pass beyond the trustee's power of recovery, the proceedings may be stayed till the involuntary petition is disposed of.¹⁸ Upon the filing of a voluntary petition while an involuntary petition is pending, the proper practice is to serve notice to the creditors filing the latter, before an adjudication on the former is allowed.¹⁹ A voluntary petition which schedules no debt which would be barred by a discharge may be dismissed at court's discretion.²⁰

§ 2294. Right of partner to resist voluntary petition by partnership.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the

¹⁰See ante, § 1822, et seq.

¹²In re Jehu, 94 Fed. 638.

¹³In re Ives, 113 Fed. 914, 51 C. C. A, 541; In re Jehu, 94 Fed. 638.

¹⁴In re Carleton, 115 Fed. 246; as to right of partner to assist voluntary petition of partnership, see post, § 2294.

¹⁵In re Flanagan, 5 Sawy. 312, Fed. Cas. No. 4,850.

¹⁶In re Stegar, 113 Fed. 978; In re Dwyer, 112 Fed. 777; In re Waxelbaum, 98 Fed. 589.

¹⁷In re Dwyer, 112 Fed. 777.

¹⁸In re Dwyer, 112 Fed. 779.

¹⁹In re Dwyer, 112 Fed. 779.

²⁰In re Colaluca, 133 Fed. 255.

petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

Eighth order in bankruptcy in effect Jan. 2, 1899.

A non-assenting partner may contest an adjudication against the firm.¹ He may set up the defense of solvency, but he cannot plead want of an act of bankruptcy, since the partners are not required to set forth such act in the petition.² Such partner is entitled to notice before the partnership is adjudged bankrupt,⁵ and where no such notice is given the defect cannot be remedied after adjudication by a paper purporting to be a consent, but not verified, qualified in terms, and signed by attorney only.⁶ Such adjudication being unauthorized will be set aside.⁷

§ 2295. Bankrupt to submit to examination—exemption from criminal prosecution.

The bankrupt shall . . . when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Clause 9 of § 7, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3425.

An examination of the bankrupt may, in important cases, be required many times,¹⁰ and may, under this section, be ordered at any time while

¹In re Forbes, 128 Fed. 140.

²In re Forbes, 128 Fed. 140.

⁵In re Murray, 96 Fed. 601.

⁶In re Altman, 95 Fed. 263.

⁷In re Russell, 97 Fed. 32; In re Altman, 95 Fed. 263.

¹⁰In re Lewensohn, 99 Fed. 73.

proceedings are pending.¹¹ It is not confined to transactions occurring within the four months preceding the adjudication, but may extend to prior transactions when pertinent.¹² The provision of the above section that no testimony by the bankrupt shall be offered in evidence against him in any criminal proceeding does not afford him complete immunity, hence he still may claim his constitutional privilege of refusing to answer.¹³ The provision applies only to testimony given by a bankrupt in his own bankruptcy case, and confines the prohibition to the use of such testimony against him in a criminal proceeding.¹⁴ It is held that under its terms the bankrupt cannot be held for perjury committed by him in supporting a claim against his estate.¹⁵

§ 2296. — when required to attend—actual expenses, when paid.

He [i. e. the bankrupt] shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Proviso § 7, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3425.

¹¹In re Price, 91 Fed. 635.

¹²In re Brundage, 100 Fed. 613.

¹³Burrell v. Montana, 194 U. S. 94.

572, 48 L. ed. 1122, 24 Sup. Ct. Rep.

787; United States v. Simon, 146

Fed. 94; United States v. Goldstein,

132 Fed. 789; see also ante, § 1738.

¹⁴United States v. Simon, 146 Fed.

94.

¹⁵United States v. Simon, 146 Fed.

94, and cases cited.

CHAPTER 66.

CREDITOR'S CLAIMS, ETC.—ADMINISTRATION AND DISCHARGE.

- § 2303. Proof and allowance of claims—various provisions.
- § 2304. Form and contents of depositions to prove debts.
- § 2305. Creditor may designate place to which his notices be sent.
- § 2306. Proof and notice on assigned claims.
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- § 2312. Special meetings of creditors called by court.
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- § 2328. Revocation of discharge.
- § 2329. Administration of partnership estate.
- § 2330. —jurisdiction over one partner sufficient.
- § 2331. —distribution of expenses.
- § 2332. —payment of debts and disposal of surplus.
- § 2333. Administration where all partners not bankrupt.

§ 2303. Proof and allowance of claims—various provisions.

a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what, securities are held therefore, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c. Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e. Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or encumbrances.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to

such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j. Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k. Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

§ 57, act July 1, 1898, c. 541, 30 Stat. 560, 561, U. S. Comp. Stat. 1901, p. 3443, as amended act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799, U. S. Comp. Stat. 1905, p. 689.

The amendment of 1903 consisted in changing clause g, which as originally enacted forbade the allowance of any claims of creditors who had received preferences unless the same were surrendered. The following sec-

tion sets forth the general form to be followed in making depositions to prove debts. Such deposition making out a prima facie case,¹ the claim will be allowed unless the court is not satisfied or the claim is contested.² This may be done by the bankrupt, no trustee having been appointed,³ or by a creditor in the name of the trustee, the trustee refusing,⁴ or by the trustee.⁵ The claimant or other witnesses may be examined by the party objecting and a postponement may be had to obtain essential evidence.⁶ The question being decided by the referee, the court will not interfere unless the decision is clearly against the evidence.⁷ By subdivision g, above, the decision of preferential creditors or of creditors to whom void or voidable conveyances have been made under § 67e, will not be considered unless such preferences or conveyances have been surrendered.⁸ There being no one to whom surrender can be made prior to trustees appointment, the offer to surrender may be made in the petition or in the course of the proceedings.⁹ A preference is defined by § 60a,¹⁰ and all such preferences are included in the meaning of this section,¹¹ whether in the particular claim sought to be allowed or on any other.¹² The surrender should be actually made,¹³ and to the trustee.¹⁴ It should be voluntary,¹⁵ hence payment of preference in obedience to court process is not a surrender within the section,¹⁶ and after final judgment of the suit brought against a creditor by trustee to avoid a preference it is too late for the former to prove his debt.¹⁷ The general rule is that the existence of a preferential intent on part of debtor, or the creditor's knowledge thereof, does not effect the necessity of a surrender in order to establish a claim.¹⁸ Claims unless within the exception stated in subdivision a, above, must be filed within a year after adjudication,¹⁹ and when filed subsequently

¹In re Carter, 138 Fed. 846.

²Whitney v. Dresser, 200 U. S. 535, 50 L. ed. 584, 26 Sup. Ct. Rep. 316, and cases cited.

³See In re Ankeny, 100 Fed. 614.

⁴Chatfield v. O'Dwyer, 101 Fed. 799, 42 C. C. A. 30.

⁵Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118.

⁶See In re Sumner, 101 Fed. 224.

⁷In re Rider, 96 Fed. 811.

⁸See ante, § 2275 and note, and see In re Vastbinder, 126 Fed. 417. Where preference received more than four months prior to petition surrender need not be made. In re Girard etc. Co. 129 Fed. 841. Otherwise, prior to amendment of 1903, see In re Busby, 124 Fed. 469.

⁹In re Vastbinder, 126 Fed. 417.

¹⁰Swarts v. Bank, 117 Fed. 3, 54 C. C. A. 387.

¹¹In re Jones, 110 Fed. 737.

¹²Swarts v. Bank, 117 Fed. 5, 54 C. C. A. 387, and cases cited; see,

however, in re Abraham, etc. Lumber Co., 110 Fed. 739.

¹³In re Chaplin, 115 Fed. 162, holding preference cannot be treated as set-off.

¹⁴See In re Currier, 2 Lowell, 436, Fed. Cas. No. 3,492.

¹⁵See In re Greth, 112 Fed. 978.

¹⁶In re Keller, 109 Fed. 118.

¹⁷In re Greth, 112 Fed. 798.

¹⁸Fort Wayne, etc. Electric Co. v. Worden, 99 Fed. 400, 39 C. C. A. 582; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; Stroebel etc. Co. v. Knost, 99 Fed. 409; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349. But see In re Alexander, 102 Fed. 464; In re Goodhile, 130 Fed. 471.

¹⁹In re Paine, 127 Fed. 246; In re Shaffer, 104 Fed. 982: time not extended by the fact that a composition is effected, see In re Brown, 123 Fed. 336.

they will not be considered.²⁰ Although a claim is provable if filed within a year,¹ a claim filed after the closing of the estate, although within the year, can be satisfied only out of unclaimed dividends and undiscovered assets.² The provision is a statute of limitations,³ and neither the court nor the referee has discretionary power to allow a subsequent filing.⁴ The presentation and delivery of proofs of claim to the trustee in bankruptcy within a year after adjudication, is a sufficient filing.⁵ If filed within the year it is sufficient although allowed thereafter.⁶

§ 2304. Form and contents of depositions to prove debts.

Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

Clause 1 of 21st order in bankruptcy in effect Jan. 2, 1899.

The blank forms for deposition to prove secured and unsecured claims will be found in the index and should be followed.¹⁰ The statement of consideration and payments in the depositions should be clear and specific.¹¹ Where it is so general that its fairness or legality cannot be determined it will be held insufficient.¹² Accounts should be itemized¹³ and sworn to in the proof.¹⁴ Amendments have been allowed to depositions in the

²⁰See *In re Hawk*, 114 Fed. 916, 52 C. C. A. 536; see contra *In re Fagan*, 140 Fed. 758, where claim subsequently filed was allowed under special circumstances.

¹*In re Rider*, 96 Fed. 808.

²*In re Stein*, 94 Fed. 124.

³*In re Stoevers*, 127 Fed. 394.

⁴*In re Ingalls Bros.* 137 Fed. 517, 70 C. C. A. 101.

⁵*Orcutt Co. v. Green*, 204 U. S. 96, 51 L. ed. —. (Adv. op. p. 195.)

⁶*In re Mertens*, 147 Fed. 177, (C. C. A.)

¹⁰See *In re Dunn etc. Co.* 132 Fed. 719.

¹¹*In re Stevens*, 107 Fed. 243.

¹²*In re Scott*, 93 Fed. 418; *In re Stevens*, 104 Fed. 325.

¹³*In re Scott*, 93 Fed. 418; *In re Blue Ridge etc. Co.* 125 Fed. 619.

¹⁴*In re Brett*, 130 Fed. 981.

courts discretion,¹⁵ even though a year has elapsed from the time of adjudication.¹⁶ Their purpose however is to correct misdescriptions and minor inaccuracies and they will not be allowed if amounting to new claims, where the time for filing new claims has expired.¹⁷ A claim unconditionally withdrawn cannot serve as the basis for filing a new claim as an amendment.¹⁸ The only pleadings authorized on presentation, are the due verification of the deposition and such objections as a creditor or the trustee may interpose.¹⁹ No particular form for objections is prescribed.²⁰ They should generally be in writing but oral statements have been permitted.¹

§ 2305. Creditor may designate place to which his notices be sent.

Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

Clause 2 of 21st order in bankruptcy in force Jan. 2, 1899.

§ 2306. Proof and notice on assigned claims.

Claims which have been assigned before proof shall be supported by a deposition of the owners at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

Third clause of 21st order in bankruptcy in force Jan. 2, 1899.

¹⁵In re Myers, 99 Fed. 691.

¹⁶Hutchinson v. Otis, 115 Fed. 937, 174.
⁵³C. C. A. 419; Idem, 190 U. S. 552,
47 L. ed. 1179, 23 Sup. Ct. Rep. 778.

¹⁷In re Stevens, 107 Fed. 243; see
also, In re McCallum, 127 Fed. 768.

¹⁸In re Thompson's Sons, 123 Fed.

¹⁹In re Carter, 138 Fed. 846.

²⁰In re Royce etc. Co. 133 Fed. 100.

¹In re Cannon, 133 Fed. 837.

§ 2307. Proof of contingent claim.

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

Fourth clause of 21st order in bankruptcy in effect Jan. 2, 1899.

§ 2308. Proof of execution of letter of attorney and assignment how made.

The execution of any letter of attorney to represent a creditor or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

Fifth clause of 21st order in bankruptcy in effect Jan. 2, 1899.

§ 2309. Re-examination of claims filed.

When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

Sixth clause of 21st order in bankruptcy in effect Jan. 2, 1899.

The trustee's petition for re-examination need only allege facts which if true are sufficient cause for a re-examination.¹⁰ While no time is spe-

¹⁰In re Watkinson & Co. 130 Fed. 218.

cified for presenting such petition, it should be done with reasonable promptness.¹¹

§ 2310. Transmission of proved claims to clerk.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

Twenty-fourth order in bankruptcy in effect Jan. 2, 1899.

§ 2311. Creditors' meetings when and how called and held and business transacted.

a. The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b. At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c. The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d. A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting

¹¹In *re Milgraum*, 133 Fed. 802.

to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f. Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

§ 55 of act July 1, 1898, c. 541, 30 Stat. 559, 560, U. S. Comp. Stat. 1901, p. 3442.

The creditors first meeting should be held in accordance with the notice and at the time and place specified.¹⁵ The appearance of the creditors is not essential but the bankrupt should be actually present.¹⁶ The meeting is presided over either by the judge or the referee.¹⁷

§ 2312. Special meetings of creditors called by court.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

Twenty-fifth order in bankruptcy in effect Jan. 2, 1899.

§ 2313. — mode of voting and those entitled.

a. Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

§ 56 of act July 1, 1898, c. 541, 30 Stat. 560, U. S. Comp. Stat. 1901, p. 3443.

The votes of absent creditors by parties having sufficient power of attorney, may be allowed;²⁰ but no proxies, or defective proxies, being given, the claims of absent creditors cannot be considered in the voting.¹ The proxies should authorize the appearance and participation in the meeting.²

¹⁵In re Eagles, 99 Fed. 695.

¹⁶Idem.

¹⁷Idem.

²⁰See In re Henschel, 113 Fed. 443, 51 C. C. A. 277.

¹In re Henschel, 113 Fed. 443, 51 C. C. A. 277; see also In re Mackellar, 116 Fed. 547.

²See In re McGill, 106 Fed. 57, 45 C. C. A. 218.

The creditors should actually own the claim: hence where a number of claims are held by a trust, the trustee may vote them only as a single claim.⁴ Secured creditors may vote but only when there is an unsecured excess to their claim, and only to the amount of such excess.⁵

§ 2314. Notices to creditors—when and how given.

a. Creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

b. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c. All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 58 of act July 1, 1898, c. 541, 30 Stat. 561, U. S. Comp. Stat. 1901, p. 3444.

An examination of the bankrupt simply for the purpose of making out schedules has been allowed, without notice.⁸ Notice should be sent of hearings on application for discharge and the practice has been approved of enclosing notice of examination of the witness in case examination may be had.⁹ Notice of creditors meetings is also necessary, and where adjudication is prayed as to individual as well as partnership debts, the notice should so state.¹⁰ Notice of dismissal is necessary and a dismissing order without notice is erroneous.¹¹ All notices should be given by the referee, whether included in the above section or not.¹²

⁸In re Kenney Co. 136 Fed. 456.

⁴See In re Kenney Co. 136 Fed. 453.

⁵In re Eagles, 99 Fed. 695.

⁸In re Franklin Syndicate, 101 Fed. 402.

⁹In re Price, 91 Fed. 635.

¹⁰In re Laughlin, 96 Fed. 589.

¹¹See ante, § 2273 and note.

¹²See In re Stoeve, 105 Fed. 355.

§ 2315. Examination of bankrupt and others regarding bankrupt's affairs.

A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Clause a of § 21, act July 1, 1898, c. 541, as amended Feb. 5, 1903, c. 487, 32 Stat. 798, U. S. Comp. Stat. 1905, p. 686.

The amendment of 1903 consisted in the addition of the proviso; the addition of the words "and his wife" following the words "including the bankrupt," and the omission of a clause following the last mentioned words, which read as follows: "who is a competent witness under the laws of the State in which the proceedings are pending." In prescribing the duties of the bankrupt, the act makes further provision as to his examination, requiring him to "submit to an examination concerning the conduct of his business" etc., "at the first meeting of his creditors and at such other times as the court shall order."¹⁵ The above provision is broad in its terms and a trustee should be allowed to use all the means at his command to obtain information in a State court.¹⁶ The order for an examination of a witness may be made on a simple application, without any showing of the questions to be asked,¹⁷ nor is it necessary that a suit be pending,¹⁸ and the witness is not as a matter of strict right, entitled to counsel.¹⁹ A receiver temporarily in charge is an officer within the provision, and the irregularity of his appointment is no grounds for a refusal to testify.²⁰ Prior to the above amendment of 1903, the test of competency of witnesses was the test afforded by the law of the particular State.¹ Hence a bankrupt's wife not brought in as a party could not be examined in a State where her common law incompetency had not been removed.² The effect of the amendment apparently is to make the wife a compellable witness in all States, subject however to the above proviso. Such was the law under the act of 1867.³

¹⁵Bankruptcy act, § 7 a. (9).

¹⁶In re Pursell, 114 Fed. 371.

¹⁷In re Howard, 95 Fed. 415; In re Fixen, 96 Fed. 748.

¹⁸In re Fixen, 96 Fed. 748.

¹⁹In re Howard, 95 Fed. 415; see also In re Stuyvesant Bank, 6 Ben. 33. Fed. Cas. No. 13,582; but see In re Alphin etc. Co. 131 Fed. 826.

²⁰In re Fixen, 96 Fed. 748.

¹See In re Josephson, 121 Fed. 145.

²In re Fowler, 93 Fed. 417; In re Jefferson, 96 Fed. 827.

³See R. S. § 5088; In re Campbell, 3 Hughes, 276, Fed. Cas. No. 2,348.

§ 2316. Sale of property pending adjustment—bond.

A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 69, act July 1, 1898, c. 541, 30 Stat. 565, U. S. Comp. Stat. pp. 3450-3451.

On an application for the seizure of the bankrupts property under this section, the petition therefor should set forth fully and specifically all the essential facts including the insolvency of the debtor and the facts constituting the alleged act of bankruptcy, or the neglect of the property.⁶ The prayer for the seizure should not be included in the prayer for adjudication.⁷ The section does not authorize the seizure of property in the hands of a third party claiming adversely.⁸

§ 2317. Sale of property.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the

⁶In *re Kelly*, 91 Fed. 505.

⁷In *re Kelly*, 91 Fed. 507.

⁸In *re Rockwood*, 91 Fed. 363; In

re Kelly, 91 Fed. 508.

court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

Eighteenth order in bankruptcy in force Jan. 2, 1899.

The adjudicating court and no other has the right to order a sale whether the property is situated within or without the district.¹¹ The general practice is to present the petition for order of sale to the referee who may grant or deny it.¹² A private sale may be ordered¹³ or the property may be disposed of at public auction.¹⁴ In the second circuit a public auctioneer has been appointed under rule of court.¹⁵ Whenever practicable the property should be sold subject to the court's approval,¹⁶ and the court may set aside the sale in its discretion,¹⁷ as where parties without fault on their part are prevented from bidding.¹⁸ In the absence of an order to the contrary the trustee is authorized to sell only the bankrupt's interest.¹⁹ Where however incumbered property is to be sold, the lienors should be notified,²⁰ and such notification should affirmatively appear on the record.¹

§ 2318. Redemption of property and compounding of claims.

Whenever it may be deemed for the benefit of the state of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustees or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

Twenty-eighth order in bankruptcy in effect Jan. 2, 1899.

¹¹In re Granite City Bank, 137 Fed. 821, 70 C. C. A. 316.

¹²In re Fisher & Co. 135 Fed. 224; see Appendix III., F. 42-46 as to orders for sale of property.

¹³In re Hawkins, 125 Fed. 633.

¹⁴In re Benjamin, 136 Fed. 175, 69 C. C. A. 191.

¹⁵Idem.

¹⁶See In re Shea, 126 Fed. 153, 61 C. C. A. 219.

¹⁷Idem.

¹⁸Idem.

¹⁹In re Muhlhauser, 121 Fed. 669, 57 C. C. A. 423.

²⁰See In re Wilka, 131 Fed. 1004; In re Saxton etc. Co. 136 Fed. 697;

¹In re Saxton etc. Co. 136 Fed. 697

§ 2319. Payment of moneys deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

Twenty-ninth order in bankruptcy in effect Jan. 2, 1899.

§ 2320. Imprisoned debtors.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

Thirtieth order in bankruptcy in effect Jan. 2, 1899.

§ 2321. Power of trustee to compromise.

The trustee may, with the approval of the court, compromise any

controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 27 of act July 1, 1898, c. 541, 30 Stat. 554, U. S. Comp. Stat. 1901, p. 3433.

A compromise with the debtor can be effected only through the trustee.⁶ When proposed it should be submitted to the creditors.⁷ Their action is not conclusive however, being subject to the courts approval.⁹

§ 2322. Arbitration—choice of arbitrators—findings.

a. The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

§ 26 of act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

§ 2323. What application for arbitration to show.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

Thirty third order in bankruptcy in effect Jan. 2, 1899.

§ 2324. Application for discharge—time for filing.

Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in

⁶In re Heyman, 108 Fed. 207.

⁷Idem.

⁹In re Heyman, 108 Fed. 207.

which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

Clause a., § 14, act July 1, 1898, c. 541, 30 Stat. 550, U. S. Comp. Stat. 1901, p. 3427.

Since the words "persons" include corporations¹³ the latter are entitled to a discharge just as individuals.¹⁴ The discretion of the court in extending the time for application for discharge is limited to six months following the expiration of the year¹⁵ and this limitation is jurisdictional.¹⁶ But the time will not be extended beyond the year unless the bankrupt was unavoidably prevented from making the application.¹⁷ When not made within the eighteen months his right to discharge is *res judicata*¹⁸ and discharge cannot be had in any subsequent proceedings.¹⁹ The application being allowed within the six months following the year, the only question open is the right to a discharge and creditors are confined to statutory objections.²⁰ The bankruptcy act provides that "the bankrupt shall attend . . . the hearing upon his application for a discharge, if filed."¹

§ 2325. — petition.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

Thirty-seventh order in bankruptcy in effect Jan. 2, 1899.

The fifth General Order provides that all petitions shall be printed or written out plainly without abbreviation.⁴ The petition for discharge shall be made by the bankrupt,⁵ or if he is insane, by his guardian.⁶ If a member of a firm desires his separate discharge the adjudication of the firm and of the petitioner as a member thereof should be stated.⁷ Verification has been held necessary.⁸ The petition should be filed with the clerk.⁹ And ten days notice to the creditors should be given before hearing.¹⁰ The

¹³Bankruptcy act, § (19.)

¹⁴In re Marshall etc. Co. 102 Fed. 873, 43 C. C. A. 38.

¹⁵In re Fahy, 116 Fed. 239; see also In re Knauer, 133 Fed. 805.

¹⁶In re Fahy, 116 Fed. 239; In re Wagner, 139 Fed. 87.

¹⁷In re Lewin, 135 Fed. 252; absence of bankrupt's attorneys no reason for extending time, In re Anderson, 134 Fed. 319.

¹⁸In re Weintraub, 133 Fed. 1000.

¹⁹Idem; see Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477.

²⁰In re Haynes, 122 Fed. 560.

¹Clause a (1) § 7, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3425.

⁴Ante, § 2270.

⁵See Form No. 57, index.

⁶In re Miller, 133 Fed. 1017.

⁷In re Meyers, 97 Fed. 757.

⁸See In re Holman, 92 Fed. 514: the form prescribed however contains no verification blank, see Form No. 57, appendix III. F. 384.

⁹In re Sykes, 106 Fed. 669.

¹⁰Ante, § 2314.

first petition being refused on its merits, it is held that a second cannot be filed.¹¹

§ 2326. Opposition to discharge or composition.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

Thirty-first order in bankruptcy in effect Jan. 2, 1899.

Objections to the discharge may be made not only by creditors who have proved their claims but also by parties claiming to be and scheduled as creditors.¹⁵ Since they set up matters of fact, they should be sworn to¹⁶ by each of the opposing creditors¹⁷ and not by their attorneys or agents, in the absence of a previous rule of court.¹⁸ The opposing creditor being a partnership, verification may be made by a partner duly authorized.¹⁹ Failure however to take exception to the signature and verification until after the evidence is all in, waives all defects,²⁰ and specifications in the form of a petition have been admitted, the bankrupt failing to object.¹

Specifications must distinctly aver facts and must be clear and certain.² If indefinite they should be made explicit so that the bankrupt may know the exact charge.³ Thus if based on a crime committed by the bankrupt, they should state the facts with substantially the exactness of an indictment,⁴ or if based on obtaining credit by false representations such representations must be set forth with the names of the persons defrauded.⁵ The specifications should show also, how the opposing creditor is interested.⁶ Amendments are however allowed⁷ the substantial motive of the specifications not being changed.⁸ But being in the courts discretion⁹ they should be allowed only to meet the ends of justice.¹⁰ The application therefor should be made to the court and not to the referee.¹¹ Specifications being filed no further pleading on the part of the bankrupt is necessary.¹²

¹¹In re Royal, 113 Fed. 140. But see In re Claff, 111 Fed. 506.

¹⁵In re Frice, 96 Fed. 611.

¹⁶Ante, § 2281; In re Brown, 112 Fed. 49, 50 C. C. A. 118.

¹⁷In re Glass, 119 Fed. 509; In re Baerncopf, 117 Fed. 975.

¹⁸In re Glass, 119 Fed. 509.

¹⁹In re Glass, 119 Fed. 509.

²⁰In re Baerncopf, 117 Fed. 975.

¹In re Howell, 105 Fed. 594.

²In re Blalock, 118 Fed. 679; In re Steed, 107 Fed. 682; In re Adams, 104 Fed. 72; In re Servis, 140 Fed. 222.

³In re Levey, 133 Fed. 572.

⁴In re Taplin, 135 Fed. 861.

⁵In re Levey, 133 Fed. 572.

⁶In re Levey, 133 Fed. 572; In re Servis, 140 Fed. 222.

⁷In re Carley, 117 Fed. 130, 55 C. C. A. 146.

⁸In re Hendrick, 138 Fed. 473; In re Pierce, 103 Fed. 64.

⁹In re Mudd, 105 Fed. 348.

¹⁰In re Morgan, 101 Fed. 982.

¹¹In re Kaiser, 99 Fed. 689.

¹²In re Logan, 102 Fed. 876; In re Crist, 116 Fed. 1007; In Northern New York the practice obtains of re-

Hence they are not admitted by his failure to answer or demur.¹³ But demurrers thereto have been made by the bankrupt and sustained by the court.¹⁴

§ 2327. Application when granted.

The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person on a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the fixing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed and of his property with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.

Clause b, § 14, act July 1, 1898, c. 541, 30 Stat. 550, U. S. Comp. Stat. 1901, p. 3427, as amended act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, U. S. Comp. Stat. 1905, p. 684.

The amendment above referred to consisted chiefly in the addition of the last four grounds for refusing a discharge. This section specifies the only causes for which a discharge may be refused,¹⁵ and the court is not authorized to extend its provisions and refuse discharge on other grounds.¹⁶ Hence a bankrupt's right to discharge is not affected by his insanity or death²⁰ nor by his non-residence¹ nor by omissions in the schedule, not

quiring all objections to specifications to be made by motion within a specified time, see *In re Baldwin*, 119 Fed. 796.

¹³*In re Crist*, 116 Fed. 1007.

¹⁴See *In re Morgan*, 101 Fed. 982; *In re Howell*, 105 Fed. 594; *In re Holman*, 92 Fed. 512.

¹⁵*In re Eades*, 143 Fed. 295.

¹⁶*In re Wolff*, 132 Fed. 396; for similar holding prior to amendment of 1903, see *Strause v. Hooper*, 105 Fed. 590.

²⁰*In re Miller*, 133 Fed. 1018.

¹*In re Goodale*, 109 Fed. 783.

fraudulent.² The "six years" mentioned in subdivision 5, above, measures the time between the first and second discharge and not between the first discharge and the second petition.³ The only issue raised by the petition for discharge is the bankrupts right thereto⁴ and the only facts properly pleadable are those refuting such right.⁵ Hence questions as to the effect of the discharge ought not to be determined.⁶ Questions as to jurisdiction are not tenable, where jurisdiction appears on the face of prior proceedings.⁷ The court may refer the application for a discharge to the referee⁸ who rules upon the sufficiency of the specification⁹ takes evidence¹⁰ and reports all the facts and gives his conclusions of law.¹¹ His findings will not be set aside unless clearly erroneous.¹² The bankrupt should be present at the hearing.¹³ The objecting creditors must establish the averments contained in the specification of objection¹⁴ not necessarily beyond a reasonable doubt¹⁵ but by a fair preponderance of evidence.¹⁶ This discharge is granted by the judge not the referee.¹⁷ But it will be deferred until filing fees are paid except where the bankrupt makes a pauper affidavit.¹⁸ In the latter case the rule has been laid down that failure to pay fees and other expenses will bar a discharge except where it appears to the courts satisfaction that the bankrupt "is a worthy object of charity."¹⁹

Action on the application for a discharge has been suspended pending settlement of creditors rights to exemptions²⁰ pending valuation of property claimed as a homestead¹ and pending the determination of questions of fraud.² But such stay has been refused pending State courts action, the right to discharge not being involved.³

§ 2328. Revocation of discharge.

The judge may, upon application of the parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has

²In re Slingluff, 105 Fed. 502; In re Morrow, 97 Fed. 574; In re Hirsch, 96 Fed. 68.

³In re Jordan, 142 Fed. 292; In re Little, 137 Fed. 521.

⁴In re Rhutassel, 96 Fed. 597; In re Mussey, 99 Fed. 72.

⁵In re Mussey, 99 Fed. 72.

⁶In re Black, 97 Fed. 493; In re Marshall Paper Co. 102 Fed. 874, 43 C. C. A. 38.

⁷In re Clisdell, 101 Fed. 246; In re Mason, 99 Fed. 256.

⁸Post, § 2340.

⁹In re Hendrick, 138 Fed. 473; In re Kaiser, 99 Fed. 689.

¹⁰See In re Logan, 102 Fed. 876.

¹¹In re Steed, 107 Fed. 682.

¹²In re Covington, 110 Fed. 143.

¹³In re Shanker, 138 Fed. 862.

¹⁴In re Crist, 116 Fed. 1007.

¹⁵See In re Greenberg, 114 Fed. 773.

¹⁶In re Levey, 133 Fed. 572; In re Hamilton, 133 Fed. 823.

¹⁷General Order No. 12, post, § 2340; also In re McDuff, 101 Fed. 241, 41 C. C. A. 316; Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607.

¹⁸In re Barden, 101 Fed. 553.

¹⁹In re Fees Payable etc. 95 Fed. 120.

²⁰In re Woodruff, 96 Fed. 317.

¹In re McBryde, 99 Fed. 686.

²See In re Hirsch, 96 Fed. 68.

³In re Cornell, 97 Fed. 29.

come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

§ 15, act July 1, 1898, c. 541, 30 Stat. 550, U. S. Comp. Stat. 1901, p. 342.

The discharge may be vacated by the court of its own motion⁷ or upon the motion of a party in interest.⁸ This includes a creditor who has failed to file or prove his claim within a year after adjudication.⁹ But the moving creditor must not be guilty of undue laches.¹⁰ The petition for revocation setting forth the facts need not allege the legal conclusion that a discharge was unwarranted.¹¹ It should be dismissed where the petitioners refuse to make a deposit to cover costs of hearing and as a result of which no further proceedings are had.¹²

§ 2329. Administration of partnership estate.

The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

Clause b. § 5 act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3424.

It is held that the above provision as to the appointment of the trustee by the partnership creditors applies only to cases of joint petition and hence in the case of the bankruptcy of a single partner, his separate creditors may vote, although the only assets to be administered are partnership assets.¹⁶

§ 2330. — jurisdiction over one partner sufficient.

The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

Clause e, § 5, act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3424.

Jurisdiction is acquired on the filing of the petition. If filed by all the partners adjudication may be had at once.¹⁹ If filed by less than all the partner refusing to join may contest just as in the case of involuntary proceedings.²⁰

⁷In re Bimberg, 121 Fed. 942.

⁸Idem.

⁹Idem.

¹⁰In re Upson, 124 Fed. 980.

¹¹In re Toothaker Bros. 128 Fed.

187.

¹²In re Lasch, 142 Fed. 277.

¹⁶In re Beck, 110 Fed. 140.

¹⁹In re Ives, 113 Fed. 911, 51 C. A. 541.

²⁰See post, § 2294, prescribing the procedure.

§ 2331. — distribution of expenses.

The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

Clause e, § 5, act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. Stat. 1901, p. 3424.

§ 2332. — payment of debts and disposal of surplus.

The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

Clause f, § 5, act July 1, 1898, c. 541, 30 Stat. 547 U. S. Comp. Stat. 1901, p. 3424.

The bankruptcy act distinguishes sharply between partnership and individual debts in respect to participation in partnership and individual assets⁴ and partnership assets will be applied first in good faith, to partnership debts,⁵ and individual assets to individual debts.⁶ Hence creditors of a partnership will not receive dividends from the individual estate of a partner until after the individual creditors have been fully paid, even though there are no partnership assets.⁷ The section applies as well to an adjudication of an individual member only, as it does to an adjudication against the partnership.⁸

§ 2333. Administration where all partners not bankrupt.

In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Clause h, § 5, act July 1, 1898, c. 541, 30 Stat. 548, U. S. Comp. Stat. 1901, p. 3424.

⁴Lamoille etc. Bank v. Stevens, 107 Fed. 245.

⁵In re Jones, 100 Fed. 781.

⁶See In re Green, 116 Fed. 118.

⁷In re Wilcox, 94 Fed. 84.

⁸Ibid.

CHAPTER 67.

PROCEEDINGS BEFORE REFEREES AND EVIDENCE.

- § 2335. Contempts before referees.
- § 2336. Referees records—certified and transmitted to court.
- § 2337. In event of referees absence or disability.
- § 2338. Duties of referees—order of reference and subsequent proceedings.
- § 2339. —time and place of referee's proceedings.
- § 2340. Certain matters to be heard by judge—but referee may report facts.
- § 2341. When papers to be filed after reference.
- § 2342. Orders of referee, what to recite.
- § 2343. Review of referee's order by judge.
- § 2344. General and special references, and from one to another, and proceedings without reference.
- § 2345. Existing law as to depositions applies.
- § 2346. —upon whom notice of taking to be served.
- § 2347. Certified copy of order approving trustee's bond evidence of title.
- § 2348. —effect of order as to compensation or discharge, as evidence.
- § 2349. Order confirming composition as revesting title and as notice when recorded.
- § 2350. Taking of testimony before referee.

§ 2335. Contempts before referees. . .

a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; (4) or refuse to appear after having been subpoenaed, or, upon appearing, refuse to take oath as a witness, or, after having taken oath, refuse to be examined according to law: Provided, That no person shall be required to attend as a witness before a referee at a place outside the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fees for one day's attendance, shall be first paid or tendered to him.

b. The referee shall certify the facts to the judge, if any person

shall do any of the things forbidden in this section. The judge shall thereupon in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

§ 41, act July 1, 1898, c. 541, 30 Stat. 556, U. S. Comp. Stat. 1901. p. 3437.

The above provision confers no new or enlarged jurisdiction. Any act, matter or thing punishable by any other United States court is punishable by a bankruptcy court.¹ The power to punish however is not vested in the referee, his duty being to certify the facts to the judge² who will deal with the matter as if the alleged contempt had arisen in his court.³ A witness is not in contempt for refusing to answer incriminating questions⁴ notwithstanding the provision that his testimony will not be used against him in a criminal proceeding.⁵ The fact that a witness refuses to testify on the advice of counsel, does not excuse the contempt.⁶ The proviso of the above section as to attendance of witnesses, has reference only to hearings before referees, and hence does not change the power of the Federal courts to compel the attendance of witnesses.⁷ It is held that a witness cannot be compelled to attend, who resides more than one hundred miles away, though within the State⁸ and that he cannot be compelled to leave the State of his residence.⁹

§ 2336. Referees records—certified and transmitted to court.

a. The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c. The book or books containing a record of the proceedings shall,

¹Boyd v. Glucklich, 116 Fed. 135, 53 C. C. A. 451.

²Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526.

³In re Romine, 138 Fed. 837; as to jurisdiction of referee in general see ante, § 2240.

⁴United States v. Goldstein, 132 Fed. 789; see also In re Levin, 131 Fed. 388.

⁵See Bankruptcy act, § 7 (9); this

provision does not amount to an exemption from prosecution, Burrell v. Montana, 194 U. S. 573, 48 L. ed. 1122, 24 Sup. Ct. Rep. 787.

⁶United States v. Goldstein, 132 Fed. 789.

⁷In re Hemstreet, 117 Fed. 569; as to attendance of witnesses in Federal court see ante, §§ 1742 et seq.

⁸In re Hemstreet, 117 Fed. 569.

⁹In re Cole, 133 Fed. 414.

when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 42, act July 1, 1898, c. 541, 30 Stat. 556, U. S. Comp. Stat. 1901, p. 3437.

§ 2337. In event of referees absence or disability.

Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 43, act July 1, 1898, c. 541, 30 Stat. 557, U. S. Comp. Stat. 1901, p. 3438.

§ 2338. Duties of referees—order of reference and subsequent proceedings.

The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

Clause 1 of 12th order in bankruptcy in force Jan. 2, 1899.

Proceedings required by the act and general orders to be had before the judge have been summarized as follows, "applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy and all petitions for adjudications when the judge is in the district. The proceedings other than these required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States or of a State, and for the removal of a trustee."¹⁶ A previous section prescribes the jurisdiction of the referee.¹⁷

¹⁶In re Abbey Press, 134 Fed. 54, 67 C. C. A. 161.

¹⁷Ante, § 2240.

§ 2339. — time and place of referee's proceedings.

The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform

Clause 2 of 12th order in bankruptcy in force Jan. 2, 1899.

§ 2340. Certain matters to be heard by judge—but referee may report facts.

Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon to the referee to ascertain and report the facts.

Clause 3 of 12th order in bankruptcy in force Jan. 2, 1899.

§ 2341. When papers to be filed after reference.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

Twentieth order in bankruptcy in force Jan. 2, 1899.

§ 2342. Orders of referee, what to recite.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

Twenty-third order in bankruptcy in effect Jan. 2, 1899.

§ 2343. Review of referee's order by judge.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

Twenty-seventh order in bankruptcy in effect Jan. 2, 1899.

A party to an order made by a referee cannot have it reviewed unless he pursues the mode above prescribed.³

§ 2344. General and special references, and from one to another, and proceedings without reference.

a. After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.

b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 22 of act July 1, 1898, c. 541, 30 Stat. 552; U. S. Comp. Stat. 1901, p. 3431.

The reference may be general or limited, under the above provision. Form No. 14 prescribes the order of general reference.⁴ Transfer to another referee has been ordered for official misconduct.⁵

§ 2345. Existing law as to depositions applies.

The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except herein provided.

Clause b of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3430.

The general procedure for the taking of depositions is set forth in a previous chapter.⁸

§ 2346. — upon whom notice of taking to be served.

Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Clause c of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3430.

³In re Home etc. Co. 147 Fed. 538.

⁴See appendix.

⁵See In re Smith, 2 Ben. 113, Fed. Cas. No. 12971.

⁸Ante, § 1760, et. seq.

§. 2347. Certified copy of order approving trustee's bond evidence of title.

A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

Clause e of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3430.

§ 2348. — effect of order as to compensation or discharge, as evidence.

A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Clause f of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3431.

§ 2349. Order confirming composition as revesting title and as notice when recorded.

A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Clause g of § 21, act July 1, 1898, c. 541, 30 Stat. 552, U. S. Comp. Stat. 1901, p. 3431.

§ 2350. Taking of testimony before referee.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have

power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

Twenty-second order in bankruptcy, in effect Jan. 2, 1899.

Under the above provision it is the duty of the referee to receive all evidence offered, note objections and record the evidence, following the equity practice.¹⁶ Hearings before referee are within the rule that party may attend judicial hearings away from place of business without being subjected to service of process.¹⁷

¹⁶In re Sturgeon, 139 Fed. 608, (C. C. A.)

¹⁷Morrow v. Dudley Co. 144 Fed. 441.



CHAPTER 68.

JURISDICTION AND PROCEDURE ON APPEAL.

- § 2360. Appellate courts to have same jurisdiction in controversies arising in bankruptcy proceedings as in other cases.
- § 2361. Special appellate jurisdiction of circuit court of appeals.
- § 2362. When appeal in equity lies to circuit court of appeals.
- § 2363. When appeal lies to Supreme Court on allowance or rejection of claims.
- § 2364. Appeals to circuit court of appeals how allowed and rejected.
- § 2365. Allowance and time for taking appeals to Supreme Court.
- § 2366. Findings of fact and conclusions of law—other papers in record.
- § 2367. —when case may be certified to Supreme Court.
- § 2368. —no appeal bond required of trustee.

§ 2360. Appellate courts to have same jurisdiction in controversies arising in bankruptcy proceedings as in other cases.

The Supreme Court of the United States, the circuit courts of appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia.

Clause a of § 24, act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3431.

The above provision confers appellate jurisdiction of controversies arising in bankruptcy proceedings in absolute terms.¹ The appellate jurisdiction conferred however is limited to those controversies between the trustee and adverse claimants the jurisdiction over which is conferred by

¹*Steele v. Buel*, 104 Fed. 968, 44 C. C. A. 287.

§ 2 of the Bankruptcy act.² It does not cover bankruptcy proceedings proper, appellate jurisdiction over which is conferred by §§ 24 b and 25 a³ and which include questions between the alleged bankrupt and his creditors as such, commencing with the petition for adjudication, ending with the discharge, and matters of administration generally.⁴ The section therefore vests the appellate courts with power to review the decisions of separable controversies in reference to the title, possession or distribution of the estates of bankrupts which the courts of bankruptcy may render in the course of their proceedings,⁵ and such power is not revoked by the grant of appellate jurisdiction over the three classes of cases mentioned in § 25 a.⁶ Nor is it impaired by the grant of power of revision in matters of law contained in § 24 b.⁷ The jurisdiction conferred by the section is limited by the general jurisdiction conferred by the act creating the circuit court of appeals.⁸ So, since that act limits the right of appeals to final decisions⁹ no appeal will be granted from a decision on a "controversy" by a bankruptcy court, not final.¹⁰

§ 2361. Special appellate jurisdiction of circuit court of appeals.

The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.^[a] Such power shall be exercised on due notice and petition by any party aggrieved.^{[b]-[d]}

Clause b of § 24, act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

[a] Review of proceedings in matters of law.

The above provision does not affect the general appellate jurisdiction vested by the previous section.¹⁵ The jurisdiction conferred is limited to a review of matters of law¹⁶ of some action taken or order made in the course

²In re Mueller, 135 Fed. 713, 68 C. C. A. 349; see Hewit v. Berlin Machine Works, 194 U. S. 300, 48 L. ed. 987, 24 Sup. Ct. Rep. 690; Hutchinson v. Otis, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; Burleigh v. Foreman, 125 Fed. 217, 60 C. C. A. 109; In re Friend, 134 Fed. 778, 67 C. C. A. 500; Security etc. Co. v. Hand, 143 Fed. 38, (C. C. A.)

³In re Friend, 134 Fed. 780, 67 C. C. A. 500; see post, §§ 2361-2362.

⁴In re Mueller, 135 Fed. 713, 68 C. C. A. 349; In re Friend, 134 Fed. 778, 60 C. C. A. 500.

⁵Hewit v. Berlin, etc. Works, 194 U. S. 300, 48 L. ed. 987, 24 Sup. Ct. Rep. 690; Dodge v. Norlin, 133 Fed. 366, 66 C. C. A. 425. and cases cited.

⁶Dodge v. Norlin, 133 Fed. 368, 66 C. C. A. 425; see Steele v. Buel, 104 Fed. 969, 44 C. C. A. 288.

⁷Dodge v. Norlin, 133 Fed. 368, 66 C. C. A. 425.

⁸See In re Columbia etc. Co. 112 Fed. 645, 50 C. C. A. 406.

⁹Ante, § 77.

¹⁰In re Columbia etc. Co. 112 Fed. 645, 50 C. C. A. 406.

¹⁵Dodge v. Norlin, 133 Fed. 369, 66 C. C. A. 425.

¹⁶Samuel v. Dodd, 142 Fed. 70, (C. C. A.), and cases cited; Elliot v. Toepfner, 187 U. S. 334, 47 L. ed. 203, 23 Sup. Ct. Rep. 133; Mueller v. Nugent, 184 U. S. 9, 46 L. ed. 409, 22 Sup. Ct. Rep. 269; Kenova etc. Co. v.

of a bankruptcy proceeding.¹⁷ Hence it does not extend to suits brought by trustees against third parties.¹⁸ Where the review of both questions of law and fact is sought the remedy is by appeal.¹⁹ The facts in proceedings under this section being taken as found in the lower court unless so clearly unsustained by the proofs, that the court would be justified, were the case before it on writ of error, in setting aside the verdict for want of evidence.¹ By the consensus of opinion the revisory jurisdiction above granted does not include orders and decrees which are appealable under the following section, the two provisions being held exclusive.² Such was the practice under the former bankruptcy act of 1867.³ This rule however may necessitate both the filing of a revisory petition and the bringing of an appeal in a doubtful case⁴ and it has been disapproved of.⁵ Among the orders which the courts have reviewed, are discretionary orders,⁶ orders directing the transfer of property to the trustee, held by the bankrupt⁷ or by a claimant⁸ or by State receiver⁹ and an order committing the bankrupt on his refusal to make such transfer,¹⁰ order requiring partners to surrender and schedule individual property;¹¹ orders denying bankrupt's application for leave to amend schedule¹² and orders vacating orders allowing such amendment,¹³ orders restraining further prosecution of attachment suits¹⁴ or replevin suits¹⁵ in State courts, or denying application to stay suits to enforce liens in such courts,¹⁶ orders denying¹⁷ or allowing¹⁸ bankrupts claim to an

Graham, 135 Fed. 717, 68 C. C. A. 355.

¹⁷In re Jacobs, 99 Fed. 539, 39 C. C. A. 647; In re Antigo etc. Co. 123 Fed. 249, 59 C. C. A. 248.

¹⁸In re Rusch, 116 Fed. 270, 53 C. C. A. 631, see also Lathrop v. Drake, 91 U. S. 516, 23 L. ed. 414; In re Mueller, 135 Fed. 711, 68 C. C. A. 349.

¹⁹See Burleigh v. Foreman, 125 Fed. 217, 60 C. C. A. 109; Hutchinson v. Otis, 115 Fed. 939, 53 C. C. A. 419; see also In re Union etc. Co. 122 Fed. 937, 59 C. C. A. 461; Courier-Journal etc. Co. v. Brewing Co. 101 Fed. 703, 41 C. C. A. 614.

¹In re Cole, 144 Fed. 393, (C. C. A.)

²In re Mueller, 135 Fed. 715, 68 C. C. A. 349; In re Worcester Co. 102 Fed. 808, 42 C. C. A. 637; In re Rouse, 91 Fed. 98, 33 C. C. A. 356; In re Good, 99 Fed. 389, 39 C. C. A. 581; Dickas v. Barnes, 140 Fed. 852.

³See Knight v. Cheney, 5 N. B. R. 305, Fed. Cas. No. 7,883; In re Alexander, Chase, 295, Fed. Cas. No. 160.

⁴In re Worcester Co. 102 Fed. 811, 42 C. C. A. 641.

⁵In re Holmes, 142 Fed. 392; In re McKenzie, 142 Fed. 385.

⁶In re Lesser, 99 Fed. 913, 40 C. C. A. 177; see also Ross v. Saunders,

105 Fed. 915, 45 C. C. A. 123; where abuse of discretion is clear; In re Carley, 117 Fed. 130, 55 C. C. A. 146.

⁷In re Nugent, 105 Fed. 581, 44 C. C. A. 620; Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381; In re Schlesinger, 102 Fed. 117, 42 C. C. A. 407.

⁸Carling v. Lumber Co. 113 Fed. 483, 51 C. C. A. 1.

⁹Blumberg v. Bryan, 107 Fed. 673, 46 C. C. A. 552; In re Abraham, 93 Fed. 766, 35 C. C. A. 592.

¹⁰In re Rosser, 101 Fed. 562, 41 C. C. A. 497.

¹¹Dickas v. Barnes, 140 Fed. 849.

¹²Moran v. King, 111 Fed. 730, 49 C. C. A. 578.

¹³In re Hawk, 114 Fed. 916, 52 C. C. A. 536.

¹⁴Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182.

¹⁵In re Russell, 101 Fed. 248, 41 C. C. A. 323.

¹⁶In re Horton, 102 Fed. 986, 43 C. C. A. 87; and see in re Marshall etc. Co. 102 Fed. 872, 43 C. C. A. 38.

¹⁷In re Carpenter, 109 Fed. 558, 48 C. C. A. 545; Richardson v. Woodward, 104 Fed. 873, 44 C. C. A. 235; In re Tollett, 106 Fed. 866, 46 C. C. A. 11; 54 L.R.A. 222.

¹⁸In re Holden, 113 Fed. 141, 51 C.

exemption, or allowing¹⁹ or disallowing²⁰ claim of preferential lien, or allowing¹ or disallowing² claim to fund in court or directing payment thereof to claimant.³ Orders dismissing involuntary petitions are reviewable only when it appears there has been an abuse of the courts discretion.⁴ The jurisdiction to revise under this section extends to territorial district courts, although jurisdiction by appeal or writ of error from such courts is vested in the territorial supreme court.⁵

[b] Petition and procedure thereon.

Since the jurisdiction to revise is in equity the equity procedure on appeals should be followed as nearly as possible.¹⁰ Ordinarily findings which involve a distinct proposition of law, or a substitute therefor, are necessary.¹¹ Hence the appellate court will in general consider only such matters of law as are shown by the record, by findings of fact or their equivalent, to have been presented below¹² and the proceedings before the referee will not usually be considered.¹³ Where however there are matters of a substantial character, justice may require that jurisdiction be taken although such matters were not presented below.¹⁴ Facts found below cannot be challenged.¹⁵ Neither the present act nor the General Orders,¹⁶ nor the act of 1867,¹⁷ made any provision, fixing the time within which the petition should be filed. In the second circuit a six months limitation has been adopted¹⁸ and this is apparently the rule in the first¹⁹ and eighth circuits also²⁰ but in the absence of a rule of court a reasonable time seems all that is necessary.¹ It is held however that no petition will be allowed after the expiration of a year.² When filed the petition must be prosecuted with

C. A. 97; *In re Falconer*, 110 Fed. 111, 49 C. C. A. 50; *In re Scheld*, 104 Fed. 870, 44 C. C. A. 223, 52 L.R.A. 188.

¹⁹*In re Oconee etc. Co.* 109 Fed. 866, 48 C. C. A. 703.

²⁰*In re Pekin Plow Co.* 112 Fed. 308, 50 C. C. A. 207; *In re Laird*, 109 Fed. 550, 48 C. C. A. 538; *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349.

¹*In re Georgia etc. Co.* 109 Fed. 632, 48 C. C. A. 571.

²*In re Lemmon*, 112 Fed. 296, 50 C. C. A. 247.

³*Hutchinson v. Le Roy*, 113 Fed. 202, 51 C. C. A. 159.

⁴*In re Levi etc. Co.* 142 Fed. 962.

⁵*Plymouth etc. Co. v. Smith*, 194 U. S. 311, 48 L. ed. 992, 24 Sup. Ct. Rep. 725; see however *In re Blair*, 106 Fed. 662, 45 C. C. A. 530.

¹⁰See General Orders No. 37; In the first and fourth circuits rules governing such proceedings have been established; see Appendix I. E.

¹¹*In re Boston etc. Co.* 125 Fed.

226, 60 C. C. A. 118; *Steiner v. Marshall*, 140 Fed. 710.

¹²*In re O'Connell*, 137 Fed. 838, 70 C. C. A. 336; *In re Shoe etc. Reporter*, 129 Fed. 589, 64 C. C. A. 156.

¹³*In re Pettingill*, 137 Fed. 840, 70 C. C. A. 338.

¹⁴*In re Boston etc. Co.* 125 Fed. 227, 60 C. C. A. 118.

¹⁵*In re Antigo etc. Co.* 123 Fed. 249, 59 C. C. A. 248.

¹⁶*Crim v. Woodford*, 136 Fed. 34, 68 C. C. A. 584.

¹⁷*In re Alexander, Chase*, 295, Fed. Cas. No. 160; *Troy etc. Bank v. Cooper*, 20 Wall. 177, 22 L. ed. 273.

¹⁸*In re Worcester Co.* 102 Fed. 812, 42 C. C. A. 641.

¹⁹See *In re Pottingill*, 137 Fed. 841, 70 C. C. A. 338.

²⁰See *In re Holmes*, 142 Fed. 391.

¹*Crim v. Woodford*, 136 Fed. 34, 68 C. C. A. 584; *In re Groetzinger*, 127 Fed. 124, 62 C. C. A. 124; *In re Grant*, 143 Fed. 661.

²See *In re Hoyt*, 127 Fed. 968.

reasonable diligence.³ It may be filed by "any party aggrieved." This includes a judgment creditor⁴ the general creditors opposing an order giving priority to a certain claim,⁵ and the bankrupt and trustee.⁶ Where the order to be reviewed is against several parties one or more may maintain the petition without joining the others.⁷ The petition should state specifically the question of law involved⁸ and should in some way present enough of the record in the district court to show such question⁹ the way in which it arose and its determination.¹⁰ This has been done by a certified copy of such record¹¹ or by an agreed statement of facts.¹² It has been held that the petition may be presented to a judge of the bankruptcy court, or to a judge of the appellate court.¹³ The court however has refused to act on a petition presented in the former method¹⁴ while the latter has been expressly sanctioned¹⁵ is prescribed by rule of court in the first and fourth circuits¹⁶ and seems to be generally followed.¹⁷ The petition does not have the effect of writ of error or appeal, so as to remove the cause,¹⁸ and while under the act of 1867 it did not operate to stay proceedings in the lower court¹⁹ proceedings for contempt under the present act have been stayed pending the petition where the question involved was the refusal of the bankrupt to surrender certain assets at courts order.²⁰ The court for the seventh circuit has required an answer to the petition.¹ In the first and fourth circuits pleadings to the petition notice to the other party and hearing are prescribed by rules.²

[c] — in the first circuit.

In the first circuit the rule is as follows:³—

"1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or under any acts which may hereafter be passed in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to

³In re Koenig, 127 Fed. 891.

⁴Clark v. Pidcock, 129 Fed. 749, 64 C. C. A. 273.

⁵See in re Rouse, etc. Co. 91 Fed. 96, 33 C. C. A. 356.

⁶See In re Standard, etc. Co. 116 Fed. 476, 53 C. C. A. 644.

⁷See In re Jemison etc. Co. 112 Fed. 969, 50 C. C. A. 641.

⁸In re Richards, 96 Fed. 937, 37 C. C. A. 634.

⁹In re Baker, 104 Fed. 288, 43 C. C. A. 536.

¹⁰In re Richards, 96 Fed. 937, 37 C. C. A. 634.

¹¹In re Richards, 96 Fed. 937, 37 C. C. A. 634.

¹²See In re Laird, 109 Fed. 550, 48 C. C. A. 538.

¹³In re Abraham, 93 Fed. 767, 35 C. C. A. 592.

¹⁴In re Williams, 105 Fed. 906.

¹⁵In re Seebold, 105 Fed. 910, 45 C. C. A. 117.

¹⁶See post notices [c]—[d].

¹⁷See In re Kerby etc. Co. 95 Fed. 118, 36 C. C. A. 677; In re Newton, 107 Fed. 429, 46 C. C. A. 399.

¹⁸In re Orman, 107 Fed. 101, 46 C. C. A. 165.

¹⁹In re Oregon etc. Co. 3 Sawy. 529, Fed. Cas. No. 10,560.

²⁰In re Schlesinger, 102 Fed. 118, 42 C. C. A. 207.

¹In re Utt, 105 Fed. 754, 45 C. C. A. 32.

²See infra, notes [c]—[d].

³Promulgated Oct. term, 1898, 94 Fed. iii.

show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the district court, at least one week before the return day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides.

2. Within one calendar month after the return day of the order to show cause, either party may demur, plead or answer; but the determination of any demurrer, plea or answer, shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

3. There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer; or the subject matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer, by proper allegation; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk through the mail or otherwise, with a copy of the motion and of the brief, and he may file in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed⁴ of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments.

5. So much of Rule 14 as relates to viva voce proofs in the districts courts, or to further proof in instance causes in admiralty, shall apply to appeals and petitions authorized by the act aforesaid, or by acts hereafter passed additional thereto or amendatory thereof; provided any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

6. The rules with reference to records, printing and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders dismissing or enlarging the times named herein, or any other orders suitable to expedite the proceeding or to prevent injustice."

[d] —in the second circuit.

In the second circuit the rule is as follows:—

“Petitions to review orders in bankruptcy filed under the provisions of Section 24 B of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the Bankruptcy Court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the Bankruptcy Court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this Court before the expiration of the times hereby limited for filing the petition and record respectively.”

[e] —in the fourth circuit.

The following rules have been adopted in the fourth circuit:—

“1. Upon the filing of the petition for review as provided for in section 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur or move to dismiss the said petition, within fifteen days from the date of such notice.

2. The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition.

3. Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for in the twenty-third rule of this court and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. That all causes coming up by appeal as provided in section 25 of said bankruptcy act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the time named herein, or any other order suitable to expedite the the proceeding or to prevent injustice.”⁶

⁶Adopted Nov. 23, 1899, 97 Fed.

[f] —in the eight circuit.

In the eighth circuit also, rules governing review under the above section have been adopted. These rules are more extensive than those in any of the other circuits. No useful purpose will be served by setting them forth here, and they will be found in full in the appendix.

§ 2362. When appeal in equity lies to circuit court of appeals.

Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories in the following cases, to wit:^[a] (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) From a judgment granting or denying a discharge; and (3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.^[b]

Clause a. of § 25, act July 1, 1893, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

[a] Bankruptcy appeals.

Appeals to the circuit court of appeals or to the supreme courts of the Territories are governed by the rules as to appeals in equity cases, except as otherwise provided by the Bankruptcy act.¹⁰ An appeal from an order or decree of the bankruptcy court will not lie unless within one of the classes specified above.¹¹ A jury trial may, however, in certain cases be demanded as of right,¹² and in such cases a review cannot be entertained either by appeal under this section or by petition under the preceding section, no jurisdiction at law being conferred by them.¹³ Resort must therefore be had to a writ of error which lies under the act creating the circuit court of appeals.¹⁴ Both an appeal and a petition for revision may be taken or filed relating to the same matter where the proper procedure is in doubt and the court will settle the controversy in which ever proceeding is appropriate.¹⁵ An appeal duly taken has been treated as a petition for review

¹⁰See post, § 2364.

¹¹In re Friend, 134 Fed. 778, 67 C. C. A. 500; see In re Groetzinger, 127 Fed. 124, 62 C. C. A. 124.

¹²See ante, § 2288, and note.

¹³In re Mueller, 135 Fed. 711, 68 C. C. A. 349; Bower v. Holzworth, 138 Fed. 28, 70 C. C. A. 396; In re Friend, 134 Fed. 778, 67 C. C. A. 500.

¹⁴In re Friend, 134 Fed. 778, 67 C.

C. A. 500; see Elliott v. Toepfner, 187 U. S. 334, 47 L. ed. 203, 23 Sup. Ct. Rep. 133.

¹⁵Fisher v. Cushman, 103 Fed. 861, 43 C. C. A. 381, 51 L.R.A. 292; In re Worcester Co. 102 Fed. 808, 42 C. C. A. 637; see also note to previous section.

in the proper case.¹⁶ As in equity suits the court will review both questions of law and fact.¹⁷ The appeal brings up the whole case and cannot be made to turn on errors of ruling made on the trial of feigned issue.¹⁸ Findings of fact will not be reversed unless clearly erroneous.¹⁹ A complete transcript of the record should be filed,²⁰ just as in equity cases,¹ which must contain all the papers, exhibits and other proceedings necessary to the hearing in the appellate court,² the appeal making the entire record available to the appellant, and imposing on him and the clerk the duty of placing the material parts of it in the transcript.³ But failure to incorporate any evidence in the record is no ground for dismissal when it does not appear that any was taken.⁴ Original evidence taken before the referee need not be included where the findings have been reviewed by the bankruptcy court pursuant to General Order No. 27.⁷ As in equity cases an assignment of error must be filed in the court below before the appeal is allowed,⁸ and points not covered by such assignment cannot be reviewed.⁹ Circuit court of appeals rule 11 is applicable requiring the assignment to point out the particular errors relied on.¹⁰ A general assignment may, however, be amended.¹¹

An appeal by a bankrupt from an order refusing a discharge, and the giving of bond, does not suspend the right of creditors to institute bankruptcy proceedings on the ground of the commission of a second act of bankruptcy.¹²

[b] What appeals may be taken—time for taking.

An appeal may be taken only from (1) a judgment granting or refusing an adjudication,¹⁶ (2) granting or denying a discharge,¹⁷ or (3) allowing or rejecting a debt or claim of five hundred dollars or over.¹⁸ This restriction has reference not to the amount of the original claim, but to

¹⁶*Chesapeake etc. Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261; but see *German, etc. Bank*, 103 Fed. 934, 43 C. C. A. 377.

¹⁷*Rush v. Lake*, 122 Fed. 561, 58 C. C. A. 447; *In re Worcester Co.* 102 Fed. 808, 42 C. C. A. 637.

¹⁸*In re Neasmith*, 147 Fed. 161. C. C. A.

¹⁹*Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425; *Barton Bros. v. Produce Co.* 136 Fed. 355, 69 C. C. A. 181; *In re Noyes*, 127 Fed. 286, 62 C. C. A. 218; *Southern etc. Co. v. Trust Co.* 141 Fed. 802.

²⁰*Cunningham v. German etc. Bank*, 103 Fed. 932, 43 C. C. A. 377.

¹*In re Robertshaw etc. Co.* 135 Fed. 220.

²*Williams Bros. v. Savage*, 120 Fed. 497, 56 C. C. A. 647.

³*Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425.

⁴*Taft v. Bank*, 141 Fed. 369.

⁷See post, § 2343; *Cunningham v.*

⁸*Lockman v. Lang*, 128 Fed. 279, 62 C. C. A. 550; *Buckingham v. Estes*, 128 Fed. 584, 63 C. C. A. 20; *In re Dunning*, 94 Fed. 709, 20 C. C. A. 437.

⁹See *Buckingham v. Estes*, 128 Fed. 587, 63 C. C. A. 20.

¹⁰*Fleckinger v. First Nat. Bank*, 145 Fed. 162; *Deering, etc. Co. v. Kelley*, 103 Fed. 261, 43 C. C. A. 225, 11 *Flickinger v. First Nat. Bank*, 145 Fed. 162.

¹²*In re Barton's Estate*, 144 Fed. 540.

¹⁶See *Elliott v. Toeppner*, 187 U. S. 327, 47 L. ed. 201, 23 Sup. Ct. Rep. 133.

¹⁷See *In re Dickson*, 111 Fed. 726, 49 C. C. A. 574, 55 L.R.A. 349.

¹⁸See *In re Cosmopolitan, etc. Co.* 137 Fed. 858, 70 C. C. A. 388.

the amount allowed or rejected.¹⁹ Just what "debt or claim" is within the meaning of the third clause, above, is not entirely clear. It has been said to refer to a debt or claim against the bankrupt only,²⁰ but an appeal has been allowed from judgment for attorney's services rendered petitioning creditors.¹ On the other hand an order allowing trustee attorney's fees has been held non-appealable,² as has also an order requiring a trustee to restore property to an intervening creditor.³ Under the Bankruptcy act of 1867 a creditor could not appeal from the allowance of a claim, such right being given to the assignee.⁴ Under the present act such appeals are ordinarily taken by the trustee,⁵ but appeals by creditors injured by the judgment have been considered.⁶ In any event a creditor may apply for an order permitting him to prosecute an appeal, upon the unreasonable refusal of the trustee.⁷ An appeal from an adjudication in involuntary bankruptcy may be by an intervening creditor or the bankrupt's assignee under a general assignment.⁸ An adjudication is reviewable on appeal although only questions of law are presented.⁹

An appeal must be taken within ten days from the time judgment is rendered,¹² and the time cannot be extended by the subsequent entry of an alias adjudication.¹³ It is said that an appeal is not taken within the meaning of the section until the petition therefor is allowed and the appeal bond and citation are filed below,¹⁴ but the general rule is that the petition and allowance is sufficient to remove the case, and the failure to file the bond and serve the citation until a few days after the time has expired will not invalidate the appeal,¹⁵ no material injury having resulted.¹⁶ A judgment is presumptively rendered on the day of its filing, notwithstanding it bears an earlier date.¹⁷ The time does not begin to run until action is taken on a petition for a rehearing,¹⁸ and a petition for a rehearing may be granted after the time for appeal has elapsed, thus

¹⁹Gray v. Grand Forks, etc. Co. 138 Fed. 344, 70 C. C. A. 634.

²⁰In re Columbia, etc. Co. 112 Fed. 645, 50 C. C. A. 406.

¹In re Curtis, 100 Fed. 784.

²Davidson & Co. v. Friedman, 140 Fed. 853.

³In re Whitener, 105 Fed. 180, 44 C. C. A. 434.

⁴See In re Troy, etc. Co. 9 Blatchf. 191, Fed. Cas. No. 14,202; In re Place, 8 Blatchf. 302, Fed. Cas. No. 11,200.

⁵See Chatfield v. O'Dwyer, 101 Fed. 797, 42 C. C. A. 30; Foreman v. Burleigh, 109 Fed. 313, 48 C. C. A. 376.

⁶In re Roche, 101 Fed. 956, 42 C. C. A. 115; In re Lorillard, 107 Fed. 667, 46 C. C. A. 553; Cunningham v. German, etc. Bank, 101 Fed. 977, 41 C. C. A. 609.

⁷See Chatfield v. O'Dwyer, 101 Fed. 800, 42 C. C. A. 30; McDaniel v. Stroud, 106 Fed. 486, 45 C. C. A. 446.

⁸In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

⁹Taft Co. v. Bank, 141 Fed. 369.

¹²Williams Bros. v. Savage, 120 Fed. 497, 56 C. C. A. 647.

¹³In re Berkebile, 144 Fed. 577.

¹⁴Norcross v. Nave, etc. Co. 101 Fed. 796, 42 C. C. A. 29.

¹⁵Columbia Ironworks v. National Lead Co. 127 Fed. 101, 62 C. C. A. 99, 64 L.R.A. 645.

¹⁶Idem.

¹⁷Peterson v. Nash, 112 Fed. 311, 50 C. C. A. 260; 55 L.R.A. 344.

¹⁸In re Worcester Co. 102 Fed. 808, 42 C. C. A. 637; see also In re Wright, 96 Fed. 820.

reviving the right of appeal.¹⁹ But this will not be done unless clearly warranted by the facts.²⁰

§ 2363. When appeal lies to Supreme Court on allowance or rejection of claims.

From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases, and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

Clause b. of § 25, act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

The Supreme Court regulations of appeals will be found in General Orders No. 36.³ Under the above section the appeals authorized are limited to two classes upon a decision allowing or rejecting a claim, (1) where the amount exceeds two thousand dollars and the question involved is one which might have been taken on appeal or writ of error to the Supreme Court from the highest State court; (2) where the matter is certified by a Supreme Court justice.⁴ So where a question arising on the allowance or rejection of a claim is reviewed by petition under § 24b, there can be no further appeal to the Supreme Court⁵ except upon certification either by the circuit court of appeals or by a justice of the Supreme Court.⁶ And such further appeal to the Supreme Court is not authorized by the act creating the circuit court of appeals.⁷ As has already been noted the Bankruptcy act, in §§ 23, 24 and 25, distinguishes between bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts.⁸ Hence a decision on a controversy

¹⁹See *In re Hudson, etc. Co.* 140 Fed. 49. 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

²⁰*In re Hudson, etc. Co.* 140 Fed. 49. 59 C. C. A. 94. ⁶*Hutchinson v. Otis*, 123 Fed. 18,

49. ⁷*Hutchinson v. Otis*, 123 Fed. 19, 59 C. C. A. 94.

³See post, § 2364. ⁸See ante, § 2360; *Holden v. Stratton*, 191 U. S. 119, 48 L. ed. 118, 24 Fed. 14, 59 C. C. A. 94.

⁵*Holden v. Stratton*, 191 U. S. 115, Sup. Ct. Rep. 45.

of the latter class is appealable to the Supreme Court under the general provisions of § 24a, either by appeal⁹ or writ of error.¹⁰

§ 2364. Appeals to circuit court of appeals how allowed and rejected.

Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

Clause 1 of 36th order in bankruptcy in effect Jan. 2, 1899.

Bankruptcy appeals generally are considered in a previous section.¹²

§ 2365. Allowance and time for taking appeals to Supreme Court.

Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

Second clause of 36th order in bankruptcy, in effect Jan. 2, 1899.

§ 2366. Findings of fact and conclusions of law—other papers in record.

In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusion of law.

Third clause of 36th order in bankruptcy, in effect Jan. 2, 1899.

§ 2367. — when case may be certified to Supreme Court.

Controversies may be certified to the Supreme Court of the

⁹Hewit v. Berlin, etc. Works, 194 U. S. 300, 48 L. ed. 987, 24 Sup. Ct. Rep. 690.

¹⁰See Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 578, 25 Sup. Ct. Rep. 306.

¹²Ante, § 2362.

United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted

Clause d. of § 25, act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

The cases in which controversies may be certified to the Supreme Court or certiorari may issue are discussed elsewhere.²⁰ The rule is not changed by the above section and a certificate from a district court of a question as to the bankruptcy court's jurisdiction will be dismissed where the case has not gone to final judgment.¹ A final decision of the circuit court of appeals being reveivable by the Supreme Court on certiorari,² decisions of that court on a petition under § 24b, of the Bankrupt act, have been reviewed.³

§ 2368. — no appeal bond required of trustee.

Trustees shall not be required to give bond when they take appeals or sue out writs of error.

Clause c. of § 25, act July 1, 1898, c. 541, 30 Stat. 553, U. S. Comp. Stat. 1901, p. 3432.

²⁰Ante, §§ 40, 41, 42; United States v. Rider, 163 U. S. 132, 41 L. ed 101, 16 Sup. Ct. Rep. 983; Bardes v. Bank, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196.

¹Bardes v. Bank, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196 United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

²Ante, § 41.

³See Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 413, 22 Sup. Ct. Rep. 269; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293.

CHAPTER 69.

PROCEDURE UNDER NATURALIZATION AND EXCLUSION LAWS.

- § 2380. Procedure for naturalization—declaration of intention.
- § 2381. —petition for citizenship and contents thereof.
- § 2382. —verification of petition.
- § 2383. —certification from commerce department to be filed therewith.
- § 2384. —declaration of allegiance, etc., in open court.
- § 2385. —evidence required at hearing.
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change of name.
- § 2390. Anarchists and polygamists excluded.
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- § 2392. Final hearing in open court—examination of witnesses, etc.
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publication.
- § 2399. —cancellation where certificate holder leaves country.
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- § 2404. Removal of Chinese not entitled to be or remain in the United
States.
- § 2405. —procedure on arrest and removal.
- § 2406. —photograph of Chinese to be attached to bail bond.
- § 2407. —commissioner may be designated by district attorney.
- § 2408. —fees of commissioner.

§ 2380. Procedure for naturalization—declaration of intention.

An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

First paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 596, 597.

The act provided the form of the declaration, which will be found among the forms in the appendix.²⁰ The courts "authorized by this act to naturalize aliens" are specified by § 3 of the above act: "United States circuit and district courts now existing or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."¹

§ 2381. — petition for citizenship and contents thereof.

Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a

²⁰Appendix, III. F. 60.

¹34 Stat. 596.

port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting. The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon final hearing of his application.

First part of second paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 597.

The form of the petition is prescribed in the act and will be found in the appendix.¹

§ 2382. — verification or petition.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and

¹See Appendix, III. F —.

that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States. . . .

Part of second paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 597.

The form of the witnesses' affidavit is set forth in the appendix.²

§ 2383. — certification from commerce department to be filed therewith.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Last part of second paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 597.

§ 2384. — declaration of allegiance, etc., in open court.

He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, State or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Third paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 597, 598.

§ 2385. — evidence required at hearing.

It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States,

²See Appendix, III. F. 62.

and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fourth paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 598.

§ 2386. Renunciation of former titles.

In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Fifth paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 598.

§ 2387. Naturalization of widow and children of deceased applicant.

When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

Sixth paragraph of § 4, act June 29, 1906, c. 3592, 34 Stat. 598.

§ 2388. Notice of hearing on petition—subpoenas to witnesses.

The clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned.

§ 5 of act June 29, 1906, c. 3592, 34 Stat. 597.

§ 2389. Petitions heard only after ninety days—not before election—change of name.

Petitions for naturalization may be made and filed during term-time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

§ 6 of act June 29, 1906, c. 3592, 34 Stat. 598.

§ 2390. Anarchists and polygamists excluded.

No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

§ 7 of act June 29, 1906, c. 3592, 34 Stat. 598, 599.

§ 2391. Requirement as to speaking English.

No alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, That the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further,

That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

§ 8 of act June 29, 1906, c. 3592, 34 Stat. 599.

§ 2392. Final hearing in open court—examination of witnesses, etc.

Every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

§ 9 of act June 29, 1906, c. 3592, 34 Stat. 599.

§ 2393. Evidence of residence in another State may be by deposition.

In case the petitioner has not resided in the State, Territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the deposition of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside.

§ 10 of act June 29, 1906, c. 3592, 34 Stat. 599.

§ 2394. Government may appear and oppose application.

The United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard

in opposition to the granting of any petition in naturalization proceedings.

§ 11 of act June 29, 1906, c. 3592, 34 Stat. 599.

§ 2395. Duties of clerk, records and reports—penalties for failure.

It is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this act to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said bureau. In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

First part of § 12, act June 29, 1906, c. 3592, 34 Stat. 599, 600.

§ 2396. — duty to keep and account for blank certificates.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Immigration and Naturalization, and shall account for the same to the said bureau whenever required so to do by such bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be

returned to the said bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned.

Last part of § 12, act June 29, 1906, c. 3592, 34 Stat. 600.

The form of the certificate of naturalization will be found in the appendix.¹

§ 2397. Papers to be bound and certificates numbered.

The declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificates was issued, and the volume number and page number of the stub of such certificate.

§ 14 of act June 29, 1906, c. 3592, 34 Stat. 601.

§ 2398. Proceedings for cancellation of certificates—notice, service and publication.

It shall be the duty of the United States district attorney for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

First part of § 15 of act June 29, 1906, c. 3592, 34 Stat. 601.

¹See Appendix III. F. 63.

§ 2399. — cancellation where certificate holder leaves country.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Part of § 15, act June 29, 1906, c. 3592, 34 Stat. 601.

§ 2400. — copy of order of cancellation to bureau and to court of issuance.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

Part of § 15, act June 29, 1906, c. 3592, 34 Stat. 601.

2401. — provisions as to cancellation applicable to existing certificates.

The provision of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

Part of § 15, act June 29, 1906, c. 3592, 34 Stat. 601.

[a] Other provisions of the act.

The sixteenth section of the act and the sections following it, provide for punishing the forging or counterfeiting of certificates of naturalization; the engraving, printing or selling of counterfeit certificates; the illegal issuance of a certificate by a clerk; the possession of blank certificates with intent to use them unlawfully; failure of the clerk to account for fees received; the exaction of other than the prescribed fees; the issuance of a false acknowledgment by a clerk, and the act of fraudulently obtaining naturalization, and accessaries thereto. Prosecution must be within five years.² The existing law is continued in effect for the purpose of prosecution of prior offenses.

§ 2402. Secretary of Commerce to prescribe rules—certificates, etc., as evidence.

The Secretary of Commerce and Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence.

§ 28 of act June 29, 1906, c. 3592, 34 Stat. 606.

§ 2403. Provisions as to persons owing permanent allegiance.

All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States

²Ante, § 891.

at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

§ 30 of act June 29, 1906, c. 3592, 34 Stat. 606, 607.

§ 2404. Removal of Chinese not entitled to be or remain in the United States.

Any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

§ 2, act May 5, 1892, c. 60, 27 Stat. 25, U. S. Comp. Stat. 1901, p. 1319.

§ 2405. — procedure on arrest and removal.

Any Chinese person, or person of Chinese descent, found unlawfully in the United States or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the government

of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers.

§ 13, act Sept. 13, 1888, c. 1015, 25 Stat. 479, U. S. Comp. Stat. 1901, p. 1317.

By an act of 1902,¹⁰ as amended in 1904,¹¹ "all laws in force on April 29, 1902," which includes the above section "are hereby re-enacted, extended and continued without modification, limitation or condition." By the acts just mentioned, such laws also apply to island territory under United States jurisdiction, and prohibit the immigration of Chinese laborers from such island territory to the mainland.¹²

A proceeding for the deportation of a Chinese is political and not criminal in its nature,¹³ hence it is competent for the government to swear such witness against himself.¹⁴ Pending the hearing¹⁵ and pending the appeal to the district court, the prisoner may be admitted to bail.¹⁶ The decision of a commissioner is conclusive in the absence of fraud or gross irregularity, and a proceeding cannot again be had on substantially the same facts.¹⁷ An appeal from the commissioner's order of deportation is a matter of right and in the absence of court rule an order allowing it is unnecessary,¹⁸ the service of notice on the commissioner and district attorney and the filing of such notice with the clerk being sufficient.¹⁹ The notice, however, must be filed within ten days.²⁰ An order of the court is necessary to stay execution pending appeal.¹ While the appeal, under the terms of the above section, is "to the judge of the district court," this is construed to mean "to the district court."² And the decision of the dis-

¹⁰Act April 29, 1902, c. 641, § 1, 32 Stat. 176.

¹¹Act April 27, 1904, c. 1630, § 5 33 Stat. 428; see Hong Wing v. United States, 142 Fed. 129, 130, explaining the purpose of this amendment.

¹²See U. S. Comp. Stat. 1905, p. 295.

¹³Low Foon Yin v. United States Commissioner, 145 Fed. 794, and cases cited; United States v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93.

¹⁴Low Foon Yin v. United States Commissioner, 145 Fed. 794.

¹⁵In re Lum Poy, 128 Fed. 974.

¹⁶In re Ah Tai, 125 Fed. 795.

¹⁷United States v. Young Chu Keng, 140 Fed. 748.

¹⁸United States v. Loy Too, 147 Fed. 750.

¹⁹United States v. Loy Too, 147 Fed. 750; and see Chow Loy v. United States, 112 Fed. 354, 50 C. C. A. 279.

²⁰United States v. See How, 100 Fed. 730.

¹United States v. Loy Too, 147 Fed. 750.

²United States v. Gee Lee, 50 Fed. 271, 1 C. C. A. 516; see also Tsoi Yü, 129 Fed. 587, 64 C. C. A. 153; but see Chow Loy v. United States, 112 Fed. 354, 50 C. C. A. 279, holding that the appeal is to the district judge as a special tribunal.

trict judge is a final decision, reviewable by the circuit court of appeals.³ Appeal not writ of error is the proper procedure.⁴ After final order of deportation by the district court, the prisoner is not entitled to bail as of right, but in the absence of statutory provision the matter is in the court's discretion.⁵ The right of appeal from the commissioner's decision being limited by the section to the Chinese person, an appeal by the United States does not lie.⁶

§2406. — photograph of Chinese to be attached to bail bond.

Whenever in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of the defendant shall be attached to said bond.

Rule 38, circuit court of appeals for the ninth circuit.⁹

§ 2407. — commissioner may be designated by district attorney.

It shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing.

§ 1, act March 3, 1901, c. 845, 31 Stat. 1093, U. S. Comp. Stat. 1901, p. 1327.

§ 2408. — fees of commissioner.

A United States commissioner shall be entitled to receive a fee of five dollars for hearing and deciding a case arising under the Chinese-exclusion laws.

§ 2, act March 3, 1901, c. 845, 31 Stat. 1093, U. S. Comp. Stat. 1901, p. 1328.

³Tsoi Yü v. United States, 129 Fed. 585, 64 C. C. A. 153.

⁴United States v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93.

⁵United States v. Fah Chung, 132 Fed. 109.

⁶United States v. Mar Ying Yuen, 123 Fed. 159.

⁹121 Fed. iii.

APPENDIX I.

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APPENDIX I.

A

RULES OF THE SUPREME COURT OF THE UNITED STATES.

1. CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court, except as provided by Rule 10.

See ante, § 561 of Code.

2. ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

See ante, § 488 of Code.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, ———, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

See ante, § 489 of Code.

3. PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

See ante, § 1886 of Code.

4.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

See ante, § 838 of Code.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

See ante, § 858.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return-day, the complainant shall be at liberty to proceed ex parte.

See ante, § 968 of Code.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

See ante, § 2058 of Code.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

See ante, § 2059 of Code.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2060 of Code.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the

notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

See ante, § 2061 of Code.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

See ante, § 2062 of Code.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

See ante, § 2057 of Code.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

See ante, § 2091 of Code.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

See ante, § 2092 of Code.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law-books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall

have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

See ante, § 2093 of Code.

8.

WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

See ante, § 1954 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

See ante, § ——— of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit-court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1970 of Code.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1950 of Code.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

See ante, § 1963 of Code.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of en-

largement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1973 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

See ante, § 1973 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

4. (As amended Jan. 29, 1906) In all cases where the period of thirty day is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, and to one hundred and twenty days from the Philippine Islands.

See ante, § 1951 of Code.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

See ante, § 1979 of Code.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

See ante, § 1986 of Code.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

See ante, § 1987 of Code.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

See ante, § 1988 of Code.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

See ante, § 1989 of Code.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

See ante, § 1990 of Code.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

See ante, § 1850 of Code.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

See ante, §§ 751, 1981 of Code.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

See ante, § 1991 of Code.

The fees of the clerk under Rule 24, section 7, shall be computed, as at

present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

See ante, § 755 of Code.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

See ante, § 2088 of Code.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

See ante, § 2089 of Code.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2086 of Code.

14.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the

first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

See ante, § 1896 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1897 of Code.

3 When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or

Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1898 of Code.

16.

NO APPEARANCE OF PLAINTIFF.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

See ante, § 2111 of Code.

17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

See ante, § 2115 of Code.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2113 of Code.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

See ante, § 2117 of Code.

20.**PRINTED ARGUMENTS.**

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

See ante, § 2072 of Code.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

See ante, § 2073 of Code.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the ex parte argument.

See ante, § 2074 of Code.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

See ante, § 2075 of Code.

21.**BRIEFS.**

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

See ante, § 2066 of Code.

2. This brief shall contain, in the order here stated—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points

of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

See ante, § 2067 of Code.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

See ante, § 2068 of Code.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6 When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

22.

ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

See ante, § 2077 of Code.

2. Only two counsel will be heard for each party on the argument of a case.

See ante, § 2078 of Code.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: Provided, always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2079 of Code.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

See ante, § 2124 of Code.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

See ante, § 1845 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, § 1846 of Code.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

See ante, § 2131 of Code.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

See ante, § 708 of Code.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

See ante, § 2105 of Code.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

See ante, § 2106 of Code.

3. Opinions printed under the supervision of the justice delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2107 of Code.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall

be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

See ante, § 2044 of Code.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

See ante, § 2045 of Code.

3. Criminal cases may be advanced by leave of the court on motion of either party.

See ante, § 2046 of Code.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

See ante, § 2047 of Code.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the Attorney-General.

See ante, § 2048 of Code.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

See ante, § 2049 of Code.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

See ante, § 2050 of Code.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

See ante, § 2051 of Code.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

See ante, § 2052 of Code.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

See ante, § 2053 of Code.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

See ante, § 2094 of Code.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2109 of Code.

29.

SUPERSEDEAS.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he failed to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

See ante, § 2014 of Code.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

See ante, § 2129 of Code.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must

be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

See ante, § 1984 of Code.

32.

WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, OR UNDER SECTION 5 OF THE ACT OF MARCH 3, 1891, CHAPTER 517.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under section 5 of the act of March 3, 1891, chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.

See ante, § 2054 of Code.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIALS.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

See ante, § 2036 of Code.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2038 of Code.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety,

for the appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1930 of Code.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9, of Rule 10.

See ante, § 1992 of Code.

36.

APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

See ante, §§ 1924, 2013 of Code.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

See ante, § 1547 of Code.

37.**CASES FROM CIRCUIT COURT OF APPEALS.**

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

See ante, § 1962½ of Code.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

See ante, § 1962½ of Code.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

See ante, § 1962 of Code.

38.**INTEREST, COSTS, AND FEES.**

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act. ?

See ante, §§ 708, 1847, 2128 of Code.

39.**MANDATES.**

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

See ante, § 2132 of Code.

ORDER IN REFERENCE TO APPEALS FROM THE COURT OF CLAIMS.

Regulations Prescribed by the Supreme Court of the United States Under Which Appeals May Be Taken From the Court of Claims to Said Supreme Court.

RULE 1.**RECORD.**

In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

See ante, § 1960 of Code.

RULE 2.

CASES HERETOFORE DECIDED.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of the alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

RULE 3.

ALLOWANCE AND TIME THEREFOR.

In all cases an order of allowance of appeal by the Court of Claims, or the chief-justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

See ante, § 1907 of Code.

RULE 4.

FINDINGS AND CONCLUSIONS.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

See ante, § 1938 of Code.

RULE 5.

REQUESTS FOR FINDINGS.

In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

See ante, § 1939 of Code.

OCTOBER TERM, 1882.

Ordered, That Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by

the act of June 16, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."

(1) Rule 8, section 2, of the Supreme Court requires the clerk to annex to and transmit with the record a copy of the opinion or opinions filed in the case.

(2) The following extract from the opinion of the Supreme Court in the case of *Burr v. The Des Moines Railroad and Navigation Co.*, 1 Wall., p. 102, will explain what is necessary to be set out in the findings:

"The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the proposition of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."

(3) Rule 8, section 5, and Rule 9, section 1, require that the record on appeal in cases from all courts must be filed with the clerk of the Supreme Court and the case docketed within thirty days from the allowance of the appeal.

Rule 20, section 1, permits submission of appeals from the Court of Claims on printed briefs without oral arguments, by consent of both parties, within the first ninety days of the term, and thereafter within thirty days after docketing, but not later than April 1. Twenty-five copies of the arguments, signed by attorneys or counsellors of the Supreme Court, must first be filed.

INSTRUCTIONS BY CLERK OF SUPREME COURT AS TO APPLICATIONS FOR WRITS OF CERTIORARI UNDER ACT OF MARCH 3, 1891.

The following are the requirements on applications for writs of certiorari under the act of March 3, 1891:

Petitions are docketed in this court as

_____, Petitioner, vs. _____, Respondent.

Before the petition will be docketed there must be furnished this office:

1. An original petition, with written signature of counsel.
2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.
3. An appearance of counsel for petitioner, signed by a member of the bar of this court.
4. A deposit of \$25 on account of costs.

Before submission of the petition there must be furnished:

1. Proof of service of notice of date fixed for submission and of copies of petition and brief upon counsel for the respondent. About two weeks' notice should be given.

2. Twenty-five printed copies of the petition.

3. Twenty-five printed copies of brief in support of petition, if any such brief is to be filed.

4. At least nine uncertified copies of record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up can not be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty copies must be printed under my supervision, in order that, should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the petition.

JAMES M. McKENNEY,

Clerk of the Supreme Court of United States.

See ante, § 1922 of Code.

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APPENDIX I.

B

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

See ante, § 365 of Code.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

See ante, § 604 of Code.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

See note, § 939 of Code.

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course,

shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

See ante, §§ 940, 941 of Code.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filling bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

See ante, § 942 of Code.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

See ante, § 943 of Code.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ

of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

See ante, §§ 967, 1095 of Code.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.

See ante, § 1096 of Code.

9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

See ante, § 1097 of Code.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

See ante, § 1098 of Code.

SERVICE OF PROCESS.

11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

See ante, § 969 of Code.

12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and

shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

See ante, § 970 of Code.

13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

See ante, § 971 of Code.

14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties quoties, against such defendant, if he shall require it, until due service is made.

See ante, § 972 of Code.

15.

The service of all process, mesne and final shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

See ante, § 973 of Code.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

See ante, § 974 of Code.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

See ante, § 975 of Code.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that

purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

See ante, § 977 of Code.

19.

When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

See ante, § 978 of Code.

FRAME OF BILLS

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

See ante, § 944 of Code.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to

set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is required, it shall also be specially asked for.

See ante, § 945, 946 of Code.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties, to the bill if they should come within the jurisdiction.

See ante, § 947 of Code.

23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

See ante, § 948 of Code.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

See ante, § 949 of Code.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference. ●

See ante, § 954 of Code.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

See ante, § 955 of Code.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

See ante, § 956 of Code.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

See ante, § 957 of Code.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

See ante, § 959 of Code.

DEMURRERS AND PLEAS.**31.**

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

See ante, § 980 of Code.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

See ante, § 979 of Code.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the fact stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

See ante, § 981 of Code.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.

See ante, § 985 of Code.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

See ante, § 986 of Code.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

See ante, § 983 of Code.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

See ante, § 984 of Code.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

See ante, § 982 of Code.

ANSWERS.**39.**

The rule, that if a defendant submits to answers he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters that he would

be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a bona fide purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

See ante, § 996 of Code.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

See ante, §§ 998, 999 of Code.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc., and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

See ante, §§ 950, 951 of Code.

[December Term, 1871. Amendment to 41st Equity Rule.] If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent

a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

See ante, § 1000 of Code.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note, to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

See ante, § 952 of Code.

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, &c.

"2. Whether, &c."

See ante, § 950 of Code.

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

See ante, § 999 of Code.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

See ante, § 958 of Code.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

See ante, § 1007 of Code.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the *décree* shall be without prejudice to the rights of the absent parties.

See ante, § 1019 of Code.

48.

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties, before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

See ante, 1020 of Code.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustee are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

See ante, § 1021 of Code.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

See ante § 1022 of Code.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

See ante, § 1023 of Code.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, (that is to say;) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

See ante, § 1025 of Code.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

See ante, § 1026 of Code.

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

See ante, § 976. of Code.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

See ante, §§ 1116, 1112, 1115 of Code.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

See ante, § 960 of Code.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

See ante, § 961 of Code.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case require it.

See ante, § 962 of Code.

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

See ante, § 997 of Code.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill

and answer But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

See ante, § 1006 of Code.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

See ante, § 1001 of Code.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together

See ante, § 1008 of Code.

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

See ante, § 1002, of Code.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel

the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

See ante, § 1003 of Code.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

See ante, § 1004 of Code.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

See ante, § 1009 of Code.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue ex parte. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

See ante, § 1048, of Code.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners

of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

See ante, § 1037 of Code.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

See ante, § 1038 of Code.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

See ante, § 1039 of Code.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

See ante, § 1040 of Code.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

See ante, § 1041 of Code.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

See ante, § 1042 of Code.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

See ante, § 1043 of Code.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

See ante, § 1044 of Code.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

See ante, § 1045 of Code.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

See ante, § 1049 of Code.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

See ante, § 1046 of Code.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

See ante, § 1047 of Code.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

See ante, § 1054 of Code.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

See ante, § 1052 of Code.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon

due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

See ante, § 1055 of Code.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

See ante, § 1053 of Code.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

See ante, § 1051 of Code.

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

See ante, § 963 of Code.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of

such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

See ante, § 1076 of Code.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

See ante, § 1070 of Code.

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

See ante, § 1071 of Code.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

See ante, § 1078 of Code.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other

inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

See ante, § 1072 of Code.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses viva voce when produced in open court, if the court shall, in its discretion, deem it advisable.

See ante, § 1057 of Code.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

See ante, § 1073 of Code.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

See ante, § 1074 of Code.

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

See ante, § 1075 of Code.

82.

The circuit courts may appoint standing master in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment,) and they may also appoint

a master pro hac vice in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

See ante, § 1069 of Code.

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

See ante, §§ 1077, 1079 of Code.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the circuit court.

See ante, § 1080 of Code.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

See ante, § 1092 of Code.

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceedings, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof,

it was ordered, adjudged, and decreed as follows, viz:” [Here insert the decree or order.]

See ante, § 1090 of Code.

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court may direct for the protection of infants and other persons.

See ante, § 1025 of Code,

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

See ante, § 1094 of Code.

89.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

See ante, § 806 of Code.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate practice.

See ante, § 937 of Code.

91.

Whenever under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

See ante, § 938 of Code.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

See ante, § 1093 of Code.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

See ante, § 2022 of Code.

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the share holders, and the causes of his failure to obtain such action.

See ante, § 953 of Code.

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APPENDIX I.

C

RULES OF ADMIRALTY PRACTICE ON THE INSTANCE SIDE OF THE COURT, IN PURSUANCE OF THE ACT OF THE 23d OF AUGUST, 1842, CHAPTER 188. ISSUE AND SERVICE OF MESNE PROCESS.

1.

No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

See ante, § 1202 of Code.

2.

In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he can not be found, to attach his goods and chattels to the amount sued for; or if such property can not be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

See ante, § 1203 of Code.

BAIL BOND OR STIPULATION.

3.

In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

See ante, § 1205 of Code.

4.

In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

See ante, § 1223 of Code.

• 5.

Bonds or stipulations in admiralty suits may be given and taken in open court, or in chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

See ante, § 1216 of Code.

6.

In all suits in personam, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

See ante, §§ 1208, 1224 of Code.

NO WARRANT OF ARREST FOR MORE THAN \$500.

7.

In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

See ante, § 1204 of Code.

WHERE PROPERTY IN CUSTODY OF THIRD PERSON.

8.

In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or

other proper officer, if, upon the hearing, the same is required by law and justice.

See ante, § 1211 of Code.

SEIZURE CUSTODY AND DISPOSITION OF PROPERTY.

9.

In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

See ante, § 1210 of Code.

10.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

See ante, § 1222 of Code.

11.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

See ante, § 1219 of Code.

PROCEEDINGS IN REM OR IN PERSONAM.

12.

In all suits by material-men for supplies or repairs, or other necessities,

the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.

See ante, § 1240 of Code.

13.

In all suits for mariners' wages, the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or the master alone in personam.

See ante, § 1241 of Code.

14.

In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone in personam.

See ante, § 1242 of Code.

15.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam.

See ante, § 1243 of Code.

16.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

See ante, § 1245 of Code.

17.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

See ante, § 1246 of Code.

18.

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrongdoer.

See ante, § 1247 of Code.

19.

In all suits for salvage, the suits may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.

See ante, § 1248 of Code.

PROCESS IN PETITORY AND POSSESSORY SUITS.

20.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

See ante, § 1213 of Code.

EXECUTION.

21.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *feri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

See ante, § 1285 of Code.

INFORMATIONS AND LIBELS.

22.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

See ante, § 1199 of Code.

23.

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant

relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

See ante, § 1198 of Code.

24.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

See ante, § 1201 of Code.

STIPULATIONS.

25.

In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

See ante, § 1225 of Code.

26.

In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

See ante, §§ 1258, 1223 of Code.

ANSWER TO LIBEL. SEE ALSO RULE 48.

27.

In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in

the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

See rule 49.

See ante, § 1259 of Code.

EXCEPTIONS TO ANSWER.

28.

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

See ante, § 1261 of Code.

DECREE PRO CONFESSO.

29.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

See ante, § 1269 of Code.

FAILURE TO ANSWER CERTAIN MATTERS.

30.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

See ante, § 1262 of Code.

31.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

See ante, § 1263 of Code.

DEFENDANT'S INTERROGATORIES.

32.

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

See ante, § 1265 of Code.

IN CASE OF ABSENCE OR SICKNESS.

33.

Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

See ante, § 1266 of Code.

INTERVENERS.

34.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

See ante, §§ 1268, 1227 of Code.

35.

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

See ante, § 1227 of Code.

EXCEPTIONS.

36.

Exceptions may be taken to any libel, allegation, or answer for surplage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

See ante, §§ 1200, 1264 of Code.

ANSWERS BY GARNISHEES.

37.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

See ante, § 1209 of Code.

DEPOSIT IN COURT.

38.

In cases of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

See ante, § 1212 of Code.

DISMISSAL.

39.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

See ante, § 1271 of Code.

REHEARING.

40.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been de-

creed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

See ante, § 1270 of Code.

SALES.

41.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

See ante, § 1287 of Code.

MONEYS PAID INTO COURT.

42.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

See ante, § 1230 of Code.

43.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interesse suo for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

See ante, § 1231 of Code.

REFERENCES TO COMMISSIONERS.

44.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

See ante, § 1282 of Code.

APPEALS TO CIRCUIT COURT.

45.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

See § 77 of Code. Admiralty appeals are now to the circuit court of appeals.

46.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

See § 805 of Code.

BAIL AND IMPRISONMENT FOR DEBT.

47.

In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State court.

See ante, § 1206 of Code.

And imprisonment for debt, on process issuing out of the admiralty, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a State court.

See ante, § 1207 of Code.

48.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

See ante, § 1260 of Code.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

EVIDENCE ON APPEAL.

49.

Further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the Act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interroga-

tories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

See note to R. 45, *supra*.

50.

When oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

See note to R. 45, *supra*.

REPLICATION.

51.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

See ante, § 1267 of Code.

RECORD ON APPEAL.

52.

The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, to that the same shall contain the following:

1. The style of the court.
2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.
4. The libel, with exhibits annexed thereto.
5. The pleadings of the defendant, with the exhibits annexed thereto.
6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.
7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted.

1. The continuances.

2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be transmitted to the circuit clerk on appeal, the clerk of the district court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

See ante, § 1289 of Code.

CROSS LIBEL.

53.

Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

See ante, § 1226 of Code.

LIMITATION OF LIABILITY.

54.

When any ship or vessel shall be libeled, or the owner or owners thereof

shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion may direct; and the said court shall also, on the application of the said owner or owners make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

See ante, §§ 1299, 1300, 1301 of Code.

55.

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided pro rata amongst the several claimants in proportion to the amount of their re-

spective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

See ante, § 1303 of Code.

56.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

See ante, § 1304 of Code.

57.

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

See ante, § 1298 of Code.

58.

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

See ante, § 1305 of Code.

BRINGING IN OTHER OFFENDING VESSEL ON LIBEL FOR COLLISION.

59.

In a suit for damage by collision, if the claimant of any vessel preceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing

to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

See ante, §§ 1244, 1273, 1229 of Code.

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APPENDIX I.
D
R U L E S
OF
THE COURT OF CLAIMS.

CLERK'S OFFICE.

1.

Clerk's office; hours of.

The clerk's office will be open every day, except Sundays, Saturdays, and holidays, from 9½ a. m. to 4 p. m. On Saturdays the office will be closed at 3 p. m. and during the Christmas holidays at 1 p. m.

2.

Attendance of clerks.

When the court is in session, both the chief clerk and the assistant clerk will be at the office during office hours. In vacation they may arrange their hours to suit each other and the public business.

3.

Duties of chief clerk.

The chief clerk will have charge of the journal of the court, of the law docket and the calendar, and of the printing; and he will also prepare the reports to Congress.

4.

Duties of assistant clerk.

The assistant clerk will attend to office business, and will have charge of the general docket, the notice book, and the giving of notices under these rules.

5.

Clerk, provision for absence.

In the absence of the chief or the assistant clerk, his duties will be performed by the other.

ATTORNEYS AND COUNSEL.

6.

Suits, by whom commenced. Power of attorney to be filed.

Suits may be commenced by the claimant in person, or through his attorney.
Fed. Proc.—116. 1841

ney in fact, or an attorney of this court. If the claimant is represented by an attorney in fact, the power must be filed with the clerk, and its execution must be proved or acknowledged before an officer authorized to take acknowledgments of deeds.

7.

Appearance. When may be entered.

In Congressional and Departmental cases attorneys may enter an appearance prior to the filing of a petition, by filing a power of attorney from the claimant, or legal representatives, or heirs of the deceased claimant.

8.

Admission of attorneys to the bar of this court, in open court. 18 C. Cls.

R. 25.

Any person of good moral character, who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any State or Territory, may be admitted, on motion in open court, to practice as an attorney and counselor of this court.

He may also be admitted by an order at chambers, on its being shown by affidavit or otherwise that he is qualified as above provided.

9.

Attorney of record, one only allowed. Changes permitted. 7 C. Cls. R. 499; 9 C. Cls. R. 346; 11 C. Cls. 725.

There shall be but one attorney of record for the claimant in any case at any one time. A firm of attorneys will be regarded as the attorney of record.

10.

Changes to be made on conditions prescribed by the court.

A claimant may change his attorney on such conditions as the court may prescribe. The moving party must produce the consent of the attorney of record or his duly authorized representative or must certify or show by affidavit that the attorney of record has been notified of the filing of the motion. If no objection to the substitution be filed by the attorney of record within ten days thereafter, the motion will be allowed.

If the attorney of record resides at a distance, the court will not act on the motion until a reasonable time has elapsed for his objection to be filed.

The motion when submitted must be accompanied either by a power of attorney from the claimant containing a power of substitution or by the certificate of the attorney of record that the substitution is made with the knowledge and assent of the claimant.

11.

—to sign pleadings, etc.

Petitions, pleadings, and motions on the part of the claimant must be signed by the attorney of record; pleadings and motions on the part of the United States, by the proper Assistant Attorney General.

12.**Indians may defend by attorney.**

Should any Indian or Indians interested desire to appear in any action under act of March 3, 1891, chapter 538 (1 Supp. R. S. 2d ed. 913), and defend by an attorney employed by them, application therefor shall be made to the court, showing such interest, the name of the Indian or Indians interested, of the attorney employed, and the approval of the Commissioner of Indian Affairs in that behalf, whereupon the court will make an order allowing such appearance and defense by the attorney employed.

13.**Counsel.**

Counsel other than the attorney of record may be heard on either side at the trial or at any stage of the proceedings, but shall not be entitled to file pleadings, give notices, or make motions.

14.**Postoffice address of claimant or attorney to be registered.**

Attorneys of record, or the claimant if he appear in person, on appearing in a suit, will register with the clerk of the court a postoffice address, to which all notices required by these rules or ordered by the court may be sent.

15.**Statement of attorneys for allowance of fees.**

Attorneys for claimants in Indian depredation cases desiring the court to make an allowance of attorney's fees for prosecuting the claim shall, on or before the submission of the cause, file a sworn statement of their employment, giving the date thereof, showing the services performed, and, if any, what unusual services have been rendered or expenses incurred by them.

THE PETITION.**16.****Filing of petition and copies.**

Suits shall be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk, with one extra copy in print or typewriting. The clerk will note thereon the day of filing, and will cause a copy to be forwarded to the Attorney General. Within twenty days thereafter the claimant shall have printed twenty-five copies of such petition, retaining ten copies for the trial record and filing the remaining copies in the clerk's office, unless the court, on motion, waives the printing of the petition.

Five of said copies shall be for Attorney General.

The petition must comply with Revised Statutes, section 1072, and must also set forth:

(1) The title of the action, with the full Christian and surnames of all the claimants.

(2) A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelevant and impertinent matter.

(3) In every case transmitted by the head of a department, by Congress, or a committee thereof, a copy of the order of transmission shall be set out or annexed.

(4) The claimant must state distinctly the amount for which he demands judgment, or the relief for which he prays.

17.

Acts and regulations to be specified.

If the claim be founded upon an act of Congress, or upon a regulation of an executive department, the act and the section thereof upon which the claimant relies must be specified, and the particular regulation of the department must be stated in terms.

18.

Contracts, how stated.

If the claim be founded upon an express contract with the United States, the substance of such contract must be set forth in the petition and, if it be in writing the original or a copy must be annexed thereto. If it be founded upon, an implied contract, the facts upon which the claimant relies to prove a contract must be specified. If it consists of several matters or items, each must be separately stated.

19.

Statutes of Limitation.—When petition may be dismissed on bar of six years. 14 Ct. Cl. 122, 374.

If it appear on the face of the petition that the claim first accrued more than six years before the petition was filed, the claimant must aver therein the existence and period of duration of some disability, recognized by law, which prevented his filing his petition within that time, in default whereof it will be considered that no such disability existed, and the petition may be dismissed on motion.

20.

In cases under sec. 14, act March 3, 1887, what claimant must aver in avoidance of statute of limitation.

In cases under section 14 of the act of March 3, 1887, chapter 359 (1 Supp. R. S. 2d ed. 559), if any statute of limitation has applied to the claim, the claimant shall set out in his petition any facts bearing upon the question whether the bar of such statute should be removed, or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

21.

When petition may be dismissed on bar of three years.

If the claimant, in avoidance of the bar of limitation, aver in his petition the existence and duration of any such disability, and it thereby appears that after the disability ended more than three years had elapsed before the petition was filed, the petition may be dismissed on motion.

22.

If petition does not show when claim accrued it must be made certain.

If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit.

23.

Averments as to time claim accrued put in issue by general traverse.

Averments in regard to the time when a claim first accrued, or in regard to an alleged disability of the claimant, will be held to be put in issue by the defendants' general traverse.

24.**Verification of petition.**

If the petition be verified by the attorney at law or other agent of the claimant, a power of attorney authorizing him to prosecute the suit or make the verification must be filed. A petition verified by the attorney of record may be filed, but the power of attorney here required must be supplied before the case goes to trial.

25.**Petition in Indian Depredation Cases.—Contents of petition, 23 C. Cls. 361.**

The petition must set forth:

(1) The title of the action, with the full Christian and surname of all the claimants, and the name of the band, tribe, or nation of defendant Indians.

(2) The residence and citizenship of each of the claimants and the damages sought to be recovered.

(3) A plain, concise statement setting forth the facts and circumstances upon which such claims are based, giving place and date, the persons, classes of persons, tribe or tribes or band of Indians by whom the alleged illegal acts were committed, the property lost or destroyed, and the value thereof, and any other facts connected with the transaction and material to the proper adjudication of the case, free from argumentative and impertinent matter.

(4) Whether the claim has been examined, approved, and allowed by the Secretary of the Interior, or under his direction; and, if so, for what amount, the date thereof and refer briefly to the official letter, report, or document showing such action, and state whether claimant elects to reopen the case and try the same before the court or desires judgment for the amount so allowed.

26.**Petition in French Spoliation Cases.**

Parties having a common interest, growing out of the seizure of the same vessel or its cargo, may unite in one petition for the recovery of their respective claims, which may be heard together.

Where insurance was made in his own name by one for himself and others, or as agent for others, or by a keeper of an insurance office, in

either case, or in case of an agent for underwriters in respect of a policy or a loss thereunder from spoliation his administrator, appointed in the jurisdiction of his last domicile, may file one petition on each policy for all the underwriters thereon, and the personal representative of the underwriters may come in and be heard thereon in respect of their respective interests.

To avoid multiplicity of petitions in behalf of separate underwriters upon a single policy, the personal representative of any one may file a petition for his decedent setting up the interest of all underwriters upon the same policy, and thereafter.

On or before January 20, 1887, the representatives of any or all the other underwriters on the policy may by motion be permitted to become parties to that petition and they will be heard as to their respective interests after filing letters of administration.

When the petition of the owners of a vessel or its cargo sets out an insurance thereon, the insurers may, under the same restrictions and in the same manner, on motion prosecute their respective interests in the same case

Where claimants are firms or joint owners, the petition of the personal representative of the last survivor may be made in behalf of all, and the personal representatives of the others may come in and be heard in respect to their interests.

27.

Petitions in cases under the Bowman and Tucker acts.

In cases for stores and supplies the petition shall embrace the following:

(1) An allegation as to loyalty of the party from whom the stores or supplies were taken or person furnishing same.

(2) If the suit is by legal representative it must be alleged when and by what authority such party was appointed such representative. And it must be alleged that the claimant brings into court his warrant of authority.

(3) It must be alleged that the claim was before the Commissioners of Claims, Quartermaster General, or Commissary General of Subsistence, and with what result together with a brief statement of the ground given for the decision.

(4) It must show the items of account before said commission or officers, and which of said items are now presented to this court.

(5) It must be stated which House of Congress or committee referred the case, with the date thereof.

It must be stated, where it is known to the claimant, what officers, regiments, brigades, or commands took or were furnished with stores or supplies or occupied the real estate in suit, or it will be ground for continuance.

Where printed copies of the petition have not been filed pursuant to Rule 16, the attorney for the claimant will file in the clerk's office, for transmission to the Attorney General, two typewritten copies of the petition and an entry to that effect will be made on the docket.

28.**Petitions in Departmental and Congressional cases.—Appearance by petition.**

After the filing of a case transmitted to the court by the head of an Executive Department or by Congress, or either House, or by a committee thereof, any person directly interested in the case may appear as a party therein by filing his petition under oath, in accordance with Rules 16 and 17.

29.**Persons indirectly interested may appear and be heard.**

Any person claiming to be indirectly interested in any question involved in such case may appear and be heard on the one side or the other, as his interest may require, upon filing a petition, under oath, setting forth specifically and concisely how he claims to be interested, and submitting the questions raised to the decision of the court.

30.**If no person interested appears the Attorney General may set case for trial.**

If no claimant directly or indirectly interested appears and files his petition within six months, the Attorney General, upon thirty days' notice to the parties who appear by the papers transmitted to be interested therein, may set the case down for trial upon such evidence as he may submit. Where such case was transmitted by the head of an executive department the court will proceed to try the case upon the statement made by the head of such department.

31.**Amendment to petition.—Imperfect petition, when may be filed. 27 Ct. Cls. 352.**

When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the Executive Departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires. The court will then, upon motion, call upon the proper department for such information or papers as may be deemed necessary, and when the same are furnished, the petition may be amended and take the place of the original petition.

32.**Amending petition. New Parties.**

A claimant desiring to amend his petition or to introduce new parties may do so at any time before final submission, without special leave, by filing an amended petition embodying the amendments desired. The right to make such amendments or to introduce new parties is subject to the objection of the defendants either before or at the trial.

33.**Bill of particulars may be required.**

The court or a judge in vacation may, on motion, require a claimant to

make his petition more specific, or to make and file a duly verified bill of particulars within a time fixed, and in case of failure so to do the petition may be dismissed.

EXECUTORS, ADMINISTRATORS, WIDOWS, AND NEXT OF KIN.

34.

Appointment of executor, etc.

If the claimant be an executor, administrator, guardian, or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of the appointment must be filed with the petition or within three months thereafter unless the court extend the time for so doing.

35.

Death of claimant.

If the claimant die pending the suit, his death may be suggested on the record, and his proper representative, on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit without special leave, but subject to the objection of the defendants either before or at the trial.

36.

Widows and next of kin.

Where a suit is prosecuted in the name of the widow of the deceased claimant, it must be shown by evidence that the present claimant is the widow of the deceased; and where it is prosecuted in the name of the heirs or next of kin of the deceased, it must be shown that they are his only heirs or next of kin.

PLEADINGS.

37.

When pleas must be filed.

Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time.

38.

Proceedings when demurrer is sustained.

If a demurrer be sustained, the claimant may, once of right, amend his petition, within such time as the court may direct; but if he decline to amend, judgment will be rendered dismissing the petition.

39.

When demurrer is overruled.

If a demurrer be overruled the defendants may of right plead to the petition within such time as the court may direct; but if they decline so to do, the claimant may proceed with the case, but shall not have judgment for his claim or for any part thereof, unless he shall establish the same by proof satisfactory to the court.

40.**Replication to set-off, etc.**

Within three months after the filing of a set-off or counter-claim by the defendants, the claimant must answer the same by replication under oath, unless the court extend the time for twenty days.

41.**Plea of fraud.**

When the Attorney General pleads, under section 1086 of the Revised Statutes, that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable the claimant to answer the same in detail; and the claimant shall, within three months after the filing of said plea, reply to the same with like particularity, under oath, unless the court extends the time for ten days.

42.**On failure of government to plead, general traverse entered by clerk.**

Unless the Attorney General shall, within sixty days after the service of the petition upon him, appear and defend by filing a plea, answer, or demurrer and by filing a notice of any counterclaim, set-off, claim of damages, demand, or defense in the premises, a general traverse of the petition shall be considered as entered on the part of the defendants, and the case shall be proceeded with the same as though an answer of general traverse had been filed.

MOTIONS.**43.****Motions to be first heard at chambers.**

Motions will be heard in the first instance before a judge at chambers. They must be in writing and come to him through the clerk's office. Those which are ex parte will be acted upon; those which are not ex parte will be sent to the law calendar for argument unless accompanied by the consent of the opposite party.

44.**Disposition of motion may be requested.**

In cases where the action of the court is necessary, or where the above procedure will not be properly applicable, the moving party may call the attention of the court to the fact and request such disposition of the motion as may be deemed suitable or necessary.

45.**Motion to amend petition—to substitute administrator—to consolidate cases**

A motion to amend a petition under Rule 32 will be regarded as ex parte and entered as allowed by the clerk; and the suggestion of the death of the claimant and the motion to substitute his executor or administrator, under Rule 32, will also be regarded as ex parte and entered as allowed by the clerk. A motion to consolidate cases involving substantially the same issues will also be regarded as ex parte. But

these orders will be subject to the objections of the defendants, either at or before the trial.

Any brief filed in connection with a motion must be printed or typewritten.

WITNESSES.

46.

When evidence may be taken.

When a petition is filed, either party may proceed to take testimony, notwithstanding that issue of fact has not been joined; but if issue is pending on demurrer, such issue must be disposed of before testimony is taken unless the court or a judge on motion otherwise orders.

47.

Testimony to be in depositions.—Officers who may take depositions.

Unless the court order a witnesses to testify orally on the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court, or a judge of a court of the United States, or a judge of a court of record in a State or Territory of the United States, or a United States commissioner, or a notary public.

When a deposition is taken before a notary public, it must be taken in the form and manner prescribed for commissioners of this court and for the same compensation.

48.

When depositions may be taken before a judge of this court.

When a witness can be conveniently examined before a judge of this court, either party, at any time prior to the examination may move for an order directing that his deposition be so taken.

The court may order a witness or a claimant to be produced before the court or one of the judges thereof for examination.

49.

Proceedings against witness in contempt.

If a witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

50.

Fees of witnesses.

The fees of witnesses shall be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

DEPOSITIONS.

51.

Depositions on written interrogatories.

Depositions obtained in foreign countries must be taken on written interrogatories, sent out under a special commission issued by the clerk.

Depositions may be taken in like manner within the United States, by consent of parties, or when authorized by the court, or by a judge in vacation.

The written interrogatories must be filed in the clerk's office, and notice thereof given to the adverse party.

Within fifteen days after such notice, the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection; and may either file cross-interrogatories, or a notice that he will cross-examine the witnesses orally, which notice shall be attached to the special commission.

If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection.

No objections to an interrogatory^o or a cross-interrogatory will be considered at the trial unless taken before the commission issues.

52.

Parties not to be present at taking.

When a deposition is taken upon written interrogatories and written cross-interrogatories, neither the Attorney General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness; which fact shall be certified by the officer taking the depositions, who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answers to writing as nearly as practicable in his precise words.

53.

Depositions on oral examination.—Notice for taking depositions on oral examination.

The party proposing to take depositions on oral examination shall cause fifteen days' notice to be given thereof to the other party or his attorney. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking the deposition.

But no deposition, except by consent of parties, or the order of court shall be taken during a day when the attorney of record for the claimant, or the attorney of the Department of Justice charged with preparation of the case or cases in which the deposition is to be used, is so engaged in the trial of cases in court that he cannot attend. It shall be the duty of the attorney receiving a notice to take deposition, in case he cannot attend for the reason stated herein, to notify the attorney on the opposite side that he will be unable to attend at the time and place stated in the notice.

54.

When witness lives more than 500 miles from Washington.

When the claimant proposes to take a deposition, and the witness resides more than 500 miles from Washington, or when the defendants propose to take the deposition, and the witness resides more than 500 miles

from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles.

55.

Notices when deposition is to be taken in the District of Columbia.

If a deposition is to be taken on behalf of the claimant in the District of Columbia, three days' notice shall be sufficient; and if it be taken on behalf of the defendants a like notice shall be sufficient when the claimant's attorney resides or has an office within the District. But if there be no reason for taking the deposition on such short notice the court or a judge thereof will enlarge the time.

56.

Depositions under 1080, R. S.

When the court has made an order under Revised Statutes, section 1080, for the taking of the testimony of the claimant, and he has been notified of the time and place, no further testimony on his part shall be taken until he has been examined, unless the court or a judge on motion otherwise orders.

57.

Questions and answers to be recorded.

When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words, except so far as this may be expressly waived by consent of both parties.

58.

Objections to questions.

No general objections to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same.

59.

When witnesses not named in the notice may be examined.

When depositions are taken on notice, as provided in Rule 53, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party, or his attorney, there present.

60.

Depositions in fee cases.—Witnesses must confine themselves to statement of facts.

In depositions hereafter taken in fee cases the witnesses are required to confine themselves to the statement of facts connected with the claim, as witnesses in other cases, and depositions taken in violation of this order will not be considered by the court. The findings must state the exact nature of the service, stating separately as to each kind of service. It must distinctly appear where more than one service of a different class is contained in the same finding as to how much is claimed for each service.

61.**General provisions as to depositions—other witnesses to be excluded.**

At the request of either party a person who either expects or intends to call as a witness in the same case, or in any kindred case, shall be excluded from the room where the testimony of a witness is being taken. If such a person remain in the room, or within hearing of the examination, after such request has been made, he shall not thereafter be admitted to testify in the case, or any kindred case, except by the consent of the party who requested his exclusion.

62.**Of the oath.—General interrogatories.**

Witnesses must be sworn or affirmed before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, age, occupation, and place of residence; whether he has any, and, if any, what, interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant.

At the conclusion of the deposition the witness shall state whether he knows of any other matter relative to the claim in question; and if he does, he shall state it.

The testimony of the witness when completed shall be read over to him and be signed by him in the presence of the officer.

In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence and read over to and signed by the witness.

63.**Sheets of depositions, how put together.**

The officer must so connect the sheets of the deposition that they can not be tampered with, and must return them sealed together. He must sign, and make the witness sign, each sheet; and generally he must spare no pains to return to the court the exact evidence he has taken.

64.**Exhibits to be marked.**

All exhibits must be carefully marked so as to be capable of immediate identification, and, when practicable, must be attached to the deposition under seal.

65.**Caption of depositions.**

The officer must state in the caption of the deposition the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.

66.**—return of.**

The officer must inclose the depositions and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the package in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.

67.**—officer's fees to be paid before opening.**

If the officer's fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the name and number of the case and for which party the testimony was taken, also the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet when so indorsed must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon unless such deposit be waived in writing by the officer. The clerk will then open the packet and tax the officer's charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party.

The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.

68.**Fees of commissioners and stenographers.**

The fees shall be 15 cents a folio of 100 words for taking and returning the depositions. But when a deposition is taken in shorthand by the commissioner he shall receive, in addition to the above fee, 5 cents a folio for writing out the notes and preparing the deposition for the witness to sign.

When the deposition is typewritten, the commissioner shall receive 5 cents, in addition to the prescribed fee of 15 cents, a folio.

But if the commissioner is not a stenographer either party may produce a stenographer to take down and write out the testimony of the witness for the use of the commissioner, in which case the commissioner shall receive only 10 cents a folio. The testimony so taken down by the stenographer must nevertheless be given in the presence of the commissioner, who will be held responsible for the accuracy of the deposition subscribed by the witness.

If the stenographer's fees be not paid at the time of taking the deposition, he may transmit a statement to the clerk, and the deposition will then be held by the clerk, subject to the provisions of Rule 67.

When but one deposition is taken on one notice, the commissioner shall receive not less than \$3.

69.**—excessive charges.**

Any commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked.

70.

—objections to notice, form, etc., when to be made.

Objections to the notice or the form and manner of taking or returning the testimony must be made in writing and filed within one month after notice of the filing of the deposition, or they will be considered as waived.

EVIDENCE.**71.**

Evidence from the Executive Departments—Attorney General may give in evidence certified papers.

The Attorney General may offer in evidence properly certified information and papers from any Executive Department without calling for the same under the provisions of section 1076 of the Revised Statutes.

A call for such information and papers will be made on claimant's motion on the approval of a judge in chambers. Such calls must show that the evidence called for is relevant, material, and competent.

A call will not be issued for evidence which presumptively is in the possession of the claimant, such as copies of letters sent by the defendants' officers to the claimant, contracts in duplicate, one of which is retained by the claimant, or any documentary evidence which the claimant can himself produce.

On the receipt of an answer to the call the clerk will notify the claimant's attorney and the Attorney General.

72.

Objections to papers, etc., when to be made.

All information and papers furnished by an Executive Department in response to a call, or through the Attorney General, are subject to objection by either party according to the rules of evidence at common law; but neither party will be required to produce the originals of such papers, or to prove their execution, unless the party objecting to such papers files in the clerk's office a written denial of their genuineness.

Such information and papers in reply to a claimant's call, not objected to by him before trial, will be regarded as evidence offered by claimant.

73.

Official papers filed in one cause, when may be used in another.

Any information or papers certified from any Executive Department, and filed in any cause, may be used and applied in any other pending cause to which the same may be applicable or pertinent, notice thereof being filed.

74.

Comparison of handwritings.—Comparison of handwriting proof of signature.

Where the defendants intend to prove the signature of a paper by comparison of handwriting, notice must be given in due time, either by describing in the brief the paper to be proved or by filing a special notice

to that effect. The claimant may then request that the papers be brought into court before the trial, and comparison of handwriting be made. This will be done at the opening of court on any day when the court is sitting.

75.

Production of original papers by the claimant.—Order for production of papers by claimant.

The court may, at the instance of the Attorney General, order any claimant, his agent, or attorney to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents, or other writings in his possession or subject to his control, in any way relating to the claim sued upon; and any claimant, his agent, or attorney, who, after due notice, refuses to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt; or the court may direct the petition to be dismissed.

76.

Depositions from Claims Commission.—Certain depositions before Commissioners of Claims may be used.

If a claim which was at any time before the Commissioners of Claims, appointed under the act of March 3, 1871, be transmitted to this court by either House of Congress, or by any committee thereof, under said act, and with such claim there be transmitted depositions, which were duly taken in conformity with the rules of said Commission, such depositions may be used by either party as evidence subject to such objections to their competency or relevancy as might be made if the deponents were examined in open court, or their depositions were regularly taken under the rules of this court.

77.

Papers before Claims Commission, how obtained.

If it be made to appear that, besides the depositions so transmitted, there are among the papers of said Commission other like depositions relating to the claimant's loyalty, or to the merits of his claim, a judge of the court may authorize such depositions, or duly certified copies thereof, to be obtained and filed in the clerk's office, to be used as evidence in the same manner and on the same terms as if they had been transmitted with the claim.

PRINTING.

78.

Depositions, how to be printed.

The testimony will not be printed except by order of the court.

In printing the testimony, the notices and the officers' captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form:

Deposition of ———, for claimant [or defendants, as the case may be], taken at ———, on the ——— day of ———, 19—; claimant's counsel, ———; defendant's counsel, ———.

79.

Matter not to be printed.

Before printing a return made to a call, the chief clerk will withhold from the copy for the Public Printer—

First. All papers of which copies have been previously printed in the record of the case; and for this purpose he will compare the two copies, and if variations are found he will take the directions of a judge in chambers before sending the return to the printer.

Second. All certificates of authenticity and certificates of acknowledgment.

Third. All papers which both parties agree to omit.

Fourth. All papers which a judge at chambers orders to be omitted.

80.

Papers, etc., returned from Departments on call when not to be printed.

If the claimant objects to printing information or papers so returned, and the Attorney General request to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be regarded as evidence offered on the part of the defense.

81.

Type and size of page.

The printed papers required by these rules must be in long primer type and in royal octavo pages, with the style and number of the case prefixed, and the paging in large, distinct type in the upper corner of the page.

The printed paging of evidence, either for the claimant or the defendants, shall be a continuation of the record and continuous throughout the whole record.

The attorneys for the claimant and for the defendant will see that the paging of their Request for Findings and Briefs follow the paging of that part of the record already printed when the brief is prepared.

82.

Depositions of claimant not to be printed until Attorney General files declaration of his intention to use it.

The deposition of a claimant, taken under section 1080 of the Revised Statutes, shall not be printed, unless the Attorney General shall first have filed in the case a written declaration of his intention to read the same in evidence on the trial; and the filing of such declaration shall be considered as the exercise of the discretion vested in that officer by said section, and shall entitle the claimant to read the examination as evidence at the trial if the Attorney General declines to do so, unless for good cause shown the court shall otherwise order.

83.**Printing by claimant in Indian depredation cases.**

In Indian depredation cases, if the claimant's papers be printed, whether briefs or evidence or both, the corresponding papers of the defendants must be; and if the printing of the claimant's papers be paid for by the attorney of record, the cost thereof will be considered in the allowance of attorney's fees.

84.**Reimbursement for printing.**

In cases where attorneys are entitled to reimbursement for printing, they will produce and file ordinary vouchers showing payment, or will certify that they have had printed and filed a designated number of pages of printing, for which they have paid a designated amount.

85.**Abstract of evidence to be printed.**

In Indian depredation cases where the claim, as shown by the request for findings, is in excess of the sum of \$2,000, the abstract of evidence and brief of counsel on both sides shall be printed and arranged in the above order at the time the case is submitted for consideration.

FINDINGS OF FACT AND BRIEF.**86.**

The claimant shall have printed twenty-five copies of his brief, fifteen of which he shall file in the clerk's office and ten of which he shall retain for making up the trial record.

The brief must set forth the points of law on which he relies, with reference to authorities.

He shall also have printed twenty-five copies of the requests for facts required by Rule V of the "Regulations prescribed by the Supreme Court regulating appeals from the Court of Claims," fifteen of which he shall file in the clerk's office and ten of which he shall retain for making up the trial record.

All printed briefs and requests for facts must be in the form and manner prescribed by Rule 81.

Five typewritten copies of the brief and requests for facts in lieu of printed copies may be filed by leave of court.

87.**Form of requests for findings.**

Such request must be in the following terms: "The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:"

Following this request must be a statement, in the form of distinct numbered propositions, of the facts which the party desires to have found; and each proposition must be so prepared, with respect to its length, sub-

ject, and phraseology, that the court may conveniently pass upon it; and they must be so arranged as to present a concise statement, in orderly and logical sequence, of the whole case, as the party desires it to appear in the findings of fact.

Subjoined to each proposition must be references to the pages of the record or to the unprinted evidence relied on in its support; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record.

88.

Brief and request of defendants.

The defendants, within thirty days after the filing of the claimant's brief and request for findings of fact, shall file their printed brief and request for findings of fact, and should indicate the requests on the claimant's part to which no objection is made

The defendants shall furnish the claimant with ten copies of such printed brief and request for findings of fact, to be used in making up the trial record, and shall file fifteen copies in the clerk's office.

If the claimant, by leave of court, has filed five typewritten copies of his brief and requests as provided for in Rule 86, the defendants may also file typewritten copies.

If the defendants' brief contains statements of fact which the claimant controverts, he must file a reply brief; otherwise it will be assumed that he concedes the facts stated.

Where claimant's requested findings are not agreed to, the defendants will point out specifically their objections to each finding and suggest any changes therein they may desire. After this is done, defendants may request such additional findings as they deem material. Such request must be in form and substance like that required of the claimant by the next preceding rule.

89.

Briefs of both parties to contain references to evidence.

The attorney of each party shall append to his brief a table of depositions, letters, documents, or other papers which he may offer in evidence on the trial, with references to the pages of the record, and if they be not of the paged record, then to the places where they may be found.

The abstract of testimony submitted with any case, if not printed, shall be typewritten, with marginal notes of the substance or items of the paragraphs either written, printed or typewritten.

MANUSCRIPT BRIEFS.

90.

Size and quality of paper.

Briefs for claimants or defendants, when not printed, must be in type-writing, upon pure white bond paper, 8 inches in width and 10½ inches in length, weighing not less than 3 and not more than 4 pounds to the ream of 500 sheets.

The typewriter ribbon must be black and the carbon blue.

When a brief and abstract of evidence will together exceed 50 pages, the abstract must be made a separate document.

The brief proper, i. e., the statement, argument, authorities etc., must be distinct from the abstract of evidence. The abstract must follow the brief proper, or be a separate document.

The abstract of evidence may be continuous, but if continuous, there must be marginal references, such as "cattle," "horses," etc.

Where the filing of additional and supplemental briefs is necessitated, attorneys are requested to file a revised brief, so that there shall not be more than two briefs filed for either claimant or defendants.

The original brief in black must be fastened at the side and indorsed for filing. It will be filed with the papers in the case and will not be taken from the files unless by order of the court. The copies must be fastened at the side and must not be folded.

In cases which involve no question of law it will be sufficient for the brief to set forth the specific facts relied upon with references to the abstract of evidence, substantially like the statement in French spoliation cases; and in such cases one copy of the abstract will be sufficient, the original being filed like the original brief.

The more a brief is reduced to points of fact or law (with appropriate references to statutes, authorities, or evidence) the less liable it is to be misunderstood.

THE CALENDAR.

91.

When the claimant has closed his evidence he shall enter the case in the Notice Book kept by the clerk.

When the defendants have closed their evidence they shall enter the fact in the Notice Book, and as soon thereafter as the claimant shall file the requests for facts and brief, as required by Rule 86, and note the same upon the notice Book, the case shall be placed upon the Trial Calendar.

The Calendar will be made up at the beginning of every term and cases will be placed thereon in the order in which they are ready. At the end of each month cases which have subsequently become entitled to be placed upon the Calendar will be placed at the foot.

Defendants are expected to prepare their defense and to file briefs, so far as practicable, in the order of the entry of cases in the Notice Book. Should defendants unreasonably delay the preparation of the defense, claimants may move that the case be placed upon the Calendar.

92.

Demurrers and pleas.

Demurrers will be placed upon the Law Calendar by the clerk immediately upon being filed.

Pleas in bar and to the jurisdiction will ordinarily be heard and disposed of when a case comes to trial in the regular course on the merits. But if it appear on the application of either party that the final disposi-

tion of a case will be expedited, or that the parties may be saved needless expense by the court first hearing and disposing of such plea, the court will order that it be placed either upon the Trial or Law Calendar.

NEGLECTED CASES

93.

If the claimant neglect, for two years after filing his petition, to close his proof and give notice to the Attorney General, as required by Rule 91, the defendants may place the case on the Calendar.

ADVANCEMENT OF CASES.

94.

Cases may be advanced when early decision is important to Government.

Whenever, in any case which the claimant has not put on the the Calendar, it shall be shown to the court on motion that an early decision thereof is important to the interests of the Government, the case may, in the discretion of the court, be placed on the Calendar by the defendants.

REMANDED CASES.

95.

Motions to remand, what to contain.

When a party desires a case to be remanded to the general docket for further proceedings he shall make a motion therefor, stating the facts expected to be proved, with the grounds of such expectation and the reasons why such action was not taken before the case was closed.

TRIALS AND OTHER PROCEEDINGS.

96.

Assignment of case for trial.

Ten or more cases on the calendar will be called, assigned, and posted in the clerk's office each day for trial on the following day, and if not then argued or submitted by the parties, or by either in the absence of the other, will be disposed of as the court may order.

When a case on the Calendar is called for trial, and the claimant is not ready to proceed, it will be placed at the foot of the Calendar; if the defendants are not ready, the case may be passed.

When a case has been so "passed" the clerk will place it on any subsequent day Calendar at the request of both parties without application to the court.

97.

Record to be made up in book form.

No case in which a printed record is required will be heard unless the claimant makes up in book form and has ready at the time of trial a complete record of the case, consisting of the printed pleadings, evidence, and requests for facts and briefs, paged consecutively. All citations from, or references to, such pleadings, evidence, and briefs must be by the consecutive paging of such book.

At the time of trial of the case the claimant shall furnish a copy of such printed record to each member of the court, and shall furnish one copy for the defendants and deliver one copy to the bailiff for binding.

98.

Oral arguments—procedure.

In oral arguments, as preliminary, the counsel for claimant will make a brief but substantial statement of the cause of action alleged in the petition, in which statement he will also embrace the material facts which, in his opinion, are established by the evidence. After the statement of claimant's counsel, and before he proceeds with his argument, the counsel for the defendants will, in like manner, make a statement of the defense; after which the counsel may proceed to argue the case in detail. In the preparation of written or printed briefs the same course will be pursued by the counsel of both parties. In cases where written or printed briefs have been filed the counsel may read the statement from the brief. This order shall not apply to arguments in cases of loyalty, and cases on the merits for stores and supplies.

Arguments in Congressional cases will be limited to one hour on a side; in all other classes of cases, to two hours.

In large and complex cases, where additional time will be necessary, application therefor must be made before the trial begins.

If cases specially set will require more than the prescribed time, it must be so stated when the application to set down is made. When it is not so stated the court will understand that the arguments can be concluded within the prescribed time.

When calling up cases in court, counsel will refer to them by their Calendar numbers and not by their docket numbers.

99.

Submission on written stipulation.

Parties may also submit, on written stipulation, any case in any jurisdiction on any docket, whether on any Calendar or not, when briefs have been filed on both sides.

100.

Submission of cases without argument.

Where cases are submitted without argument upon stipulation, the parties will note at the foot of the submission paper (by the date of filing) the briefs and stipulations, if any, upon which the case is intended to be submitted. Where this is not done the case will not be regarded as having been submitted.

101.

Requirements before submission of cases.

No submission of a case on loyalty or merits will be permitted until the following requirements are complied with by claimants's attorney, under the supervision of the bailiff:

When a submission is on loyalty, the petition, all reports previously

made by any officers on the subject, abstract of evidence, briefs on both sides, and other most important papers relied upon by either party, must be selected, strapped together, and placed on top of the bundle of papers to be sent to the conference room.

102.

—on merits.

When submission is on merits, two extra copies of petition, the reports of officers previously made on the merits of the claim, abstract of evidence, with the original evidence, requests for findings, briefs on both sides, finding of loyalty, and a statement of the case, made up by filling one of the blank findings printed for the court, including the allegations of the petition, must in like manner be strapped together and put at top of the bundle to be sent to conference room.

BRIEFS AND FACTS IN FRENCH SPOILIATION CASE.

103.

Printed statement.

The claimants on account of the vessel, cargo, or insurance, or some one or more of them concerned in the same seizure, shall have printed twenty-five copies of a printed statement of alleged facts under the heads herein-after set out. Fifteen of said copies shall be filed in the clerk's office and ten copies shall be retained by claimant for the trial record.

Documents not printed in the record must be numbered, put in envelopes (as far as practicable), and noted on the outside thereof.

Under each head reference must be made to the pages of the printed record, and to unprinted and separate documents by number of envelope and number of paper therein, or other convenient designation, relied upon in support of allegations.

FORM OF STATEMENT.

Title of Case.

(1) Name of vessel and master.

Docket number of each case with the full names of claimants, and where there are interveners, their names to be set out under the case in which they intervene, with the number of any separate petition by them; to be made up after the manner of the case of the schooner *Phoenix*, reported to Congress, thus:

Schooner *Phoenix*—Solomon Babson, master.

- 129. Thomas Cushing, administrator of Marston Watson, claimant.
- 3162. Charles T. Lovering, administrator of Joseph Taylor, claimant.
James C. Davis, administrator of Cornelius Durant, claimant.
- 260. Charles F. Adams, administrator of Peter C. Brooks, claimant.
William Sohler, administrator of Nathaniel Fellowes, claimant.

VESSEL.

- (2) Names of owners and their respective shares.
- (3) When and where built.
- (4) Register.
- (5) Date of sailing and points of departure and destination.
- (6) Seizure and condemnation.
- (7) Facts relied upon as showing illegality of condemnation.
- (8) Insurance on vessel or freight, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

CARGO.

- (9) Owners of cargo, stating each separately and whether the interest be in whole or divided, with number of case in which they appear.
- (10) Value of cargo and of each claimant's interest therein.
- (11) Insurance on cargo, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

VESSEL, CARGO, AND INSURANCE.

- (12) Assignments.
- (13) When there are adverse claimants, the facts alleged by each claimant to be specified.
- (14) In case of intervention, the date of filing of motion, and case in which filed, to be stated with reference to envelope in which same are to be placed.
- (15) Evidence of citizenship of claimants and identity must be referred to under their respective names.
- (16) Time of death of partners when administrator sues as representative of survivor.
- (17) Administrators, receivers, and assignees, when and where appointed, and evidence of appointments.
- (18) When facts relied upon as found in other cases, such cases must be specifically referred to.

RECAPITULATION AND SUMMARY.

Name of each claimant, stating number of petition, and where printed or found, and when an intervener, the date of intervention and where motion is found, and setting forth exactly in items what is claimed by him in all, as owner of vessel or cargo, or as insurer, stated separately and with references as aforesaid, so that the court may readily find all the evidence necessary to state each claimants's case distinctly.

The defendants shall file five printed or type written copies of their brief setting forth in detail all defenses upon which they rely.

The claimant shall file five printed or typewritten copies of a reply brief to the new matter relied on by the defendants within thirty days after the defendants have made final defenses.

Within three days after the cause shall be argued and submitted the

claimants shall make and file findings of fact if they expect a favorable report to Congress.

Every paper filed in spoliation cases shall state at the beginning the name and character of the vessel and the name of the master, and shall be indorsed in like manner.

DISMISSAL ON DEATH OF CLAIMANT.

104.

On the death of a sole claimant, if his executor or administrator does not come in and prosecute the action, as provided in Rule 35, on or before the first ten days of the next term after the suggestion is made, the case may be dismissed, provided the Attorney General shall have served notice upon the attorney of record in the case three months at least before the commencement of such term.

NOTICES.

105.

Parties filing petitions, pleadings, and motions, except motions for calls on Departments, must at the same time leave with the clerk written notice, thereof, addressed to the attorney of the adverse party, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk's entry on his docket will be prima facie evidence of the service. In the computation of time, the day of the service will be excluded, and the day on which a party is required to appear, or on which an act is required to be done, will be included.

NEW TRIAL.

106.

A new trial will not be granted where, upon the whole case, justice has been done between the parties and the judgment is substantially right, although there may have been some mistakes committed at the trial.

In cases transmitted to the court by Congress, or either House, or a committee thereof, or by the head of a Department, under the acts of March 3, 1883, c. 116 (1 Supp. R. S., 2d ed., 403), and March 3, 1887, ch. 359 (1 Supp. R. S., 2d ed., 559) and in cases under the French spoliation act of January 20 1885, ch. 25 (1 Supp. R. S., 2d ed., 471), new trials will not be granted after the findings have been reported as required by law, except in accordance with the provisions of section 1088 of the Revised Statutes.

107.

New trial, grounds of.

A motion for a new trial, other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds; First, error of fact; second, error of law; and third, newly discovered evidence. It must be made at the term in which the judgment is rendered.

108.

—founded on error of fact, what to specify.

A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.

109.

—founded on error of law, what to specify.

A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

110.

Motion for new trial founded on newly discovered evidence what to set forth.

A motion by the claimant upon the ground of newly discovered evidence will not be entertained unless it appear therein that the newly discovered evidence came to the knowledge of the claimant, his attorney of record, or counsel after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted, and that it is not cumulative.

Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth—

First. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.

Second. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts.

Third. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel were employed at the trial, were unknown to such counsel, until after the close of the trial.

Fourth. The reasons why the claimant, his attorney of record, or counsel could not have discovered said evidence before the trial by due diligence.

Where such affidavits can not be procured in time to file with the motion, it may state that affidavits or other evidence will be filed, but such affidavits or evidence must be filed within three calendar months after the filing of the motion, or within such additional time as the court may allow. If not then filed, the court, at the request of the opposing party, will proceed to the consideration of the motion in chambers as if no such intent had been expressed therein. Should the time for filing affidavits expire after the adjournment of the court for the summer vacation, they may be filed at any time before the first Monday in October.

111.

Motion must be accompanied by brief.

A motion for a new trial must also be accompanied by the brief of the moving party. It will be considered by the judges in conference upon such brief and affidavits, if any, and will then either be overruled on the court's own motion or sent to the Law Calendar for argument.

APPEALS.**112.**

Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or, if taken by the United States, it must be signed by the Attorney General or the proper Assistant Attorney General.

Such application, if made when the court is not in session, must be filed with the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket.

EXAMINATION AND WITHDRAWAL OF PAPERS.**113.**

Any person having an interest wishing to see any papers on file in the clerk's office will apply therefor to the chief or assistant clerk.

No papers shall be permanently withdrawn or temporarily taken out of the clerk's office, except on motion for good cause shown, and upon such terms as the court or a judge may order.

ENTERING ORDERS AND FILING PAPERS.**114.**

No order will be entered by the clerk unless it be directed from the bench, or be reduced to writing and marked "Allowed" by the Chief Justice or one of the judges.

115.

Papers to be indorsed before filing.

The clerk will not file any paper unless it be properly indorsed showing the nature of same, with the title and number of the suit and the name of the attorney filing it.

EXTENSION OF TIME.**116.**

The limitation of time provided in these rules for the doing of any act may be extended on motion for good cause shown.

The Supreme Court rules respecting appeals from the Court of Claims will be found at the end of Supreme Court Rule 39, ante.

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APPENDIX I.

E

RULES

OF THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT,

JANUARY 13, 1903.

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in the centre, with a dash beneath; as follows:

See ante, § 71 of Code.

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3.

TERMS AND SESSIONS.

One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

See ante, § 309 of Code.

4.

QUORUM.

1. In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in Rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day. or sine die.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process, depending in or returned to the court, preparatory to hearing, trial or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes [see ante, § 570 of Code], and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL AND OTHER OFFICERS.

The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers and other officers as the court may from time to time order.

7.**ATTORNEYS AND COUNSELLORS.**

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any circuit court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

See ante, § 491 of Code.

8.**PRACTICE.**

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.**PROCESS.**

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.**BILL OF EXCEPTIONS.**

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.**ASSIGNMENT OF ERRORS.**

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned. See Rule 24, paragraph 4.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On an appeal from an interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error and citations, must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court. [ante in this appendix, also § 1289 of Code.]

The testimony in such a record shall embrace the viva voce proof in the district court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the district court.

See ante, § 1963 of Code.

7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

See ante, § 2090 of Code.

8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in Rule 13 of the circuit courts of this circuit [see post in this appendix], *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafterwards until the cause has been postponed to the next term or session.

See ante, § 2090 of Code.

9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact

dehors the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

See ante, § 2090 of Code.

10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

See ante, § 2090 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING AND DISMISSING CASES.

1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court.

See ante, § 1974 of Code.

2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, whether in term time or vacation, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case, or file the record, after the same shall have been docketed or dismissed under this rule, unless by the order of the court after notice to the adverse party.

But the defendant in error or appellee may, at his option, docket the case and file the record; and, if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

See ante, § 1976 of Code.

3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.

DOCKET AND CALENDARS.

1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

2. He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper

representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And, within thirty days after the filing of the appeal as this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representatives within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES BY AGREEMENT.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed: but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. The motion day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under rule 16) or to advance cases, or for a writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

5. Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

See ante, § 2064 of Code.

22.

CALL AND ORDER OF THE CALENDAR.

1. On the first Tuesday of October and of January, and on the second Tuesday of April, the court, except as may, from time to time, be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order; but no case from the District of Massachusetts shall be called before the second Tuesday of the session.

See ante, § 2055 of Code.

2. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

3. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

See ante, § 2116 of Code.

4. When a case is reached in the regular call of the calendar, and there is no appearance for either party, the case may be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed, or be postponed to the next session, as the court may order.

See ante, § 2116 of Code.

6. If a case is called for hearing at two stated sessions successively, and, on the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

See ante, § 2118 of Code.

7. The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

See ante, § 2057 of Code.

8. Five cases are liable to be called on the coming in of the court on each day.

9. Revenue and other cases which concern the United States, and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by order of the court.

10. Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

11. No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave.

See ante, § 2055 of Code.

23.

PRINTING RECORDS.

1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

See ante, § 1980 of Code.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed, when the case is reached at the regular call of the docket, the case may be dismissed.

See ante, § 1994 of Code.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel.

See ante, § 1994 of Code.

4. The clerk shall take to the printer the original transcript on file; but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

See ante, § 1994 of Code.

5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

See ante, § 1994 of Code.

6. The parties may stipulate in writing that parts only of the records

shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

See ante, § 1994 of Code.

7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

See ante, § 1994 of Code.

8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of one difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

See ante, § 1994 of Code.

9. In case of reversal, affirmance or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

See ante, § 1853 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated,—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified. See Rule 11.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: Provided, always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

All records, arguments and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments, filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.

REHEARING.

A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later unless by leave granted during the term. It must be in print, in the form and style required by Rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, Whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.

See ante, § 1848 of Code. •

4. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

5. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

7. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

32.

MANDATE.

In every case finally determined, a mandate, or other proper process in the nature of a procedendo, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for rehearing has been filed and remains undisposed of.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

ERROR IN CRIMINAL CASES.

On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

See ante, § 1548 of Code.

36.

PETITIONS IN BANKRUPTCY CASES.

1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or any acts in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the district court, at least one week before the return day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides.

2. Within one calendar month after the return day of the order to show cause, either party may demur, plead or answer; but the determination of any demurrer, plea or answer shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

3. There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer; or the subject-matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer, by proper allegation; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments.

5. So much of Rule 14 as relates to viva voce proofs in the district courts, or to further proof in instance causes in admiralty, shall apply to appeals and petitions authorized by the act aforesaid, or by acts additional thereto or amendatory thereof: Provided, That any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

6. The Rules with reference to records, printing and briefs, and all other Rules, except as herein modified, shall apply to the proceedings to which this order relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceedings or to prevent injustice.

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RULES

OF THE

United States Circuit Court of Appeals

FOR THE

SECOND CIRCUIT

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Second Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Second Circuit" in two lines, in the center, with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

One term of this court shall be held annually at the city of New York on the third Tuesday of October, and shall be adjourned to such times and places as the court may from time to time designate.

See ante, § 309 of Code.

4.

QUORUM.

1. If, at any time, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes [see ante, § 570 of Code], and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes [see ante, § 625 of Code], and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with which such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court, of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts: and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judg-

ment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignments of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be

made up as provided in General Admiralty Rule No. 52 [ante § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by a writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall

be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous; Provided, however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree, rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such

writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

23.

PRINTING RECORDS.

On the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

See ante, § 1994 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error, or appellant, shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated.—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is

alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error, or an appellee, shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted.

4. When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion, and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. (as amended) Upon writs of error, appeals in admiralty, appeals from orders granting a preliminary injunction and in appeals in customs cases, one hour on each side, and in other cases one hour and a half will be allowed. But in all cases where there are no difficult questions of law and the amount involved does not exceed \$500, and in appeals and petitions

for review in bankruptcy, only one-half hour each side will be allowed. No more time than above specified will be allowed without special leave of the Court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing arguments. (as amended.)

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All arguments and briefs printed for the use of the Court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases of equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the

proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody, of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

1. An appeal or writ of error from a Circuit Court or a District Court to this Court in the cases provided for in Sections 6 and 7 of the Act entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891, and Acts to amend said Act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also

grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

See ante, § 1924 of Code.

2. Where such writ of error to this Court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

See ante, § 1548 of Code.

36.

1. In all cases the plaintiff in error or appellant on docketing a case and filling a record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf.

See ante, §§ 1979, 1980 of Code.

2. At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys.

See ante, § 2134 of Code.

37.

In the preparation of briefs any citations made from "Federal Cases" must be accompanied by the citation of the original report of the case, or, when the case is not elsewhere reported than in the Federal Cases, by a statement to that effect.

See ante, § 2071 of Code.

38.

Petitions to review orders in bankruptcy filed under the provisions of Section 24 B of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the Bankruptcy Court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the Bankruptcy Court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this Court before the expiration of the times hereby limited for filing the petition and record respectively.

THE ADMIRALTY RULES OF SECOND CIRCUIT.

RULE I.

APPEALS AND NEW PLEADINGS.

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of.

See ante, § 1934[a] of Code.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.

See ante, § 2096 of Code.

RULE II.

NOTICE AND BOND.

Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court a bond for costs of the appeal, with sufficient surety in the sum of \$250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the Court below enforced, unless otherwise ordered by a judge of this Court.

See ante, § 2023 of Code.

Sec. 2. And if the appellant desires to stay the execution of the decree of the Court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a judge of this Court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this Court in the cause, or on the mandate of this Court by the Court below.

See ante, § 2024 of Code.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

See ante, § 2025 of Code.

RULE III.

REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

See ante, § 2096 of Code, also § 1934[a].

RULE IV.

APOSTLES ON APPEAL TO CONTAIN.

Section 1. The apostles, on an appeal to this Court, shall, in cases where a general notice of appeal is served, consist of the following:

(1.) A caption exhibiting the proper style of the Court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of

the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2.) All the pleadings, with the exhibits annexed thereto.

(3.) All the testimony and other proofs adduced in the cause.

(4.) The interlocutory decree and any order of the Court which appellant may desire to have reviewed on the appeal.

(5.) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the Court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6.) All opinions of the Court, whether upon interlocutory questions or finally deciding the cause.

(7.) The final decree, and the notice of appeal; and

(8.) The assignments of error.

See ante, § 1964 of Code.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

See ante, § 1965 of Code.

Sec. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

See ante, § 1966 of Code.

RULE V.

CERTIFYING RECORDS.

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this Court the apostles certified by the clerk of the District Court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

See ante, § 1967 of Code.

RULE VI.

IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this Court within ten days after service on his proctor of notice that the apostles are filed in the Court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

See ante, § 2097 of Code.

RULE VII.

NEW ALLEGATIONS, &C.

Upon sufficient cause shown, this Court or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles and upon at least four days' notice to the adverse party.

See ante, § 2091 of Code.

RULE VIII.**NEW PLEADINGS—NEW TESTIMONY.**

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

See ante, § 2091 of Code.

RULE IX.**NEW TESTIMONY—HOW TAKEN.**

Such testimony shall be taken by deposition before any United States commissioner, or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this Court with interrogatories annexed. Upon proper cause shown, the Court may grant an open commission.

See ante, § 2091 of Code.

RULE X.**PRINTING NEW PLEADINGS AND TESTIMONY.**

If new pleadings are filed or testimony taken in this Court, the same shall also be printed and furnished by the clerk, as in the 23d General Rule provided.

See ante, § 1996 of Code.

RULE XI.**MOTIONS.**

All motions shall be made upon at least four days' notice.

See ante, § 2065 of Code.

RULE XII.**WRIT OF INHIBITION.**

A writ of inhibition may be awarded by this Court on motion of the appellant to stay proceedings in the Court below when circumstances require.

RULE XIII.**MANDAMUS.**

Mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the Clerk, or Court, below.

See ante, § 1968 of Code.

RULE XIV.**CASES TO BE PLACED ON DOCKET.**

Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk.

See ante, § 1977 of Code.

RULE XV.**BRIEFS.**

Section 1. Counsel for the appellant shall file with the clerk of this Court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall at the same time serve two copies

thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain in order here stated:

(1.) A statement of the nature of the appeal, the Court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2.) If the pleadings have been amended in this Court or new proofs have been taken, it shall be stated what amendments have been made and in what respect the new proofs have changed, or tended to change, the case as made in the Court below.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the Court ten printed copies of his brief and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and in case new proofs are taken on behalf of the appellee, the brief shall so state and wherein the new proofs have changed the case as made in the Court below.

See ante, § 2071 of Code.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

See ante, § 1854 of Code.

RULE XVI.

MANDATES.

The decrees of this Court shall direct that a mandate issue to the Court below.

See ante, § 2133 of Code.

RULE XVII.

EXTENSION OF TIME.

The time specified in the foregoing Rules for any proceeding may be extended by order of a judge of this court.

See ante, § 1934[d], 1941 of Code.

RULE XVIII.

WHEN RULES OF DISTRICT COURTS TO APPLY.

In all matters, in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this Court, the rules of practice of the District Court of the district in which the cause was decided, being in force at the time (not being inconsistent with these rules), will be adopted so far as may seem proper.

See ante, § 1934[c] of Code.

RULE XIX.

WHAT GENERAL RULES SHALL BE DEEMED ADMIRALTY RULES.

The following of the General Rules of this Court and no others, shall be deemed Admiralty Rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; Section 4 or Rule 14; Rules 15, 16, 17, 18, 19, 20, 21, 22, 23; Section 5 of General Rule 24; Rules 25, 26, 27, 28, 29; Section 4 of Rule 30; Rules 31, 32, 34 and 36.

See ante, § 1934[b] of Code. 1908

RULES

OF THE

United States Circuit Court of Appeals,

FOR THE

THIRD CIRCUIT

Adopted in Open court, June 16, 1891.

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Third Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Third Circuit" in two lines, in the centre with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

The terms of this court shall commence and be held on the first Tuesday of March and the first Tuesday of October, at the City of Philadelphia.
(Amendment June 15, 1904.)

See ante, § 309 of Code.

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decisions thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, [see ante, § 570 of Code] and shall give bond in a sum to be fixed, and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, [see ante, § 625 of Code] and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance, of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court, on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States and on subscribing the roll; but no fee shall be charged therefor, and all attorneys and counsellors of the Circuit Court of the United States, for the Third Circuit, shall be attorneys and counsellors of this court without taking any further oath.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law, in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.**SUPERSEDEAS AND COST BONDS.**

1. Supersedeas bonds in the circuit and district courts **must** be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.**WRITS OF ERROR, APPEALS, RETURN, AND RECORD.**

1. The clerk of the court to which any writ of error may be directed, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code. 1912

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1280] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of

error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless a sufficient cause is shown for further postponement. (See also supplementary rule *infra* after R. 34.)

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtained an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court,

and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante. § 2110 of Code.

21.**MOTIONS.**

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.**PARTIES NOT READY.**

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

23.

And now, December 7, 1893, in lieu of the present rule, numbered Twenty-three, the Court adopts the following rule, the same to apply to cases hereafter brought to this Court:

PRINTING RECORDS.

1. On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate, in writing, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the Court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error, or appellant, the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket, because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which may have been printed in any other court.

and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

March 18, 1895. Ordered that, except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed with the clerk, under Rule 23, at least ten days before the first day of the term.

See ante, § 1994 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in

error or an appellee is in default he will not be heard, except on consent of his adversary, and by respect of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be delivered to the clerk and recorded.

2. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during

the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

7. Ordered, That the table of fees and costs in the Circuit Courts of Appeals, established in pursuance of the Act of Congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, 15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

Ordered, In pursuance of the Act of Congress of February 19, 1897 (29 Stat., 536, c. 263), that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record.....	\$5 00
Entering an appearance	25
Transferring a case to the printed calendar.....	1 00
Entering a continuance	25
Filing a motion, order, or other paper.....	25
Entering any rule, or making or copying any record or other paper, for each one hundred words.....	20
Entering a judgment or decree.....	1 00
Every search of the records of the court and certifying the same..	1 00
Affixing a certificate and a seal to any paper.....	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, super- vising the printing and distributing the copies, for each printed page of the record and index.....	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for super- vising the printing).....	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing.....	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee.....	20 00

See ante, § 710 of Code.

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this

court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon cognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from a final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

Rule—

And now, March 12th, 1900, it is ordered that the following additional rule be adopted.

Per Curiam.

In making up the docket for argument for the term cases continued at former terms and all remanets shall be placed at the head of the argument list in the order with respect to each other in which they stood on the docket at the last preceding term.

See ante, § 2055 of Code.

Fed. Proc.—121.

RULES

OF THE

United States Circuit Court of Appeals

FOR THE

FOURTH CIRCUIT

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Fourth Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Fourth Circuit" in two lines, in the center, with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

See ante § 309 of Code.

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes [see ante, § 570 of Code], and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office, without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER, AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, subscribing the roll, and on payment of a fee of \$5.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the

several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BOND.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fails to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or con-

tinuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1289], of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.**DOCKETING CASES.**

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.**DOCKET.**

(See also R. 35 post.)

1. The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and shall print a docket containing all pending cases at each term of the court, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellants, unless sufficient cause is shown for further postponement.

2. All cases where the record has been printed and copies thereof furnished to the counsel as provided in Rule 23 shall stand for argument at the term or adjourned term holden next after the docketing of the case.

See ante, § 2055 of Code.

18.**CERTIORARI.**

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party,

be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted; unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representative shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in

which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation, reciting the substance of such order, shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, that the said representative may, at any time before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear argument on the part of the plaintiff, and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

23.

PRINTING RECORDS.

1. Hereafter all records shall be printed under the supervision of the clerk, by such printer and at such rate as the court may designate.

See ante, § 1994 of Code.

2. Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within 10 days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term.

See ante, § 1994 of Code.

3. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

See ante, § 1994 of Code.

4. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed.

See ante, § 1904 of Code.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given.

See ante, § 1853 of Code.

24.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of this court, at least ten days before every term or adjourned term, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the term or adjourned term. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

All records, arguments and briefs printed for the use of this court shall be in small pica type, 24 pica "ems" to a line, with an index and a suitable cover containing the title of the court and the cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be $9\frac{1}{4} \times 6\frac{1}{4}$ inches, except that in patent cases the size of the pages shall be $10\frac{3}{4} \times 7\frac{5}{8}$ inches; that is to say, large enough to bind

in copies of Patent Office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conform to this rule.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

See ante, § 2108 of Code.

29.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determine. But such petition shall not operate to stay the mandate or other process provided for in Rule 32, except by special order of the court.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out

merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in court, except when the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court, or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

7. In pursuance of the act of Congress of February 19, 1897 (29 Stat., 536, c. 263), the following table of fees and costs in the Circuit Court of Appeals has been established, to take effect on the first day of March, A. D., 1898:

Docketing a case and filing the record.....	\$ 5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance.....	25
Filing a motion, order or other paper.....	25
Entering any rule, or making or copying any record or other paper, for each one hundred words.....	20

Entering a judgment or decree.....	1 00
Every search of the records of the court and certifying the same....	1 00
Affixing a certificate and a seal to any paper.....	1 00
Receiving, keeping and paying money, in pursuance of any statute or order of the court, one per cent. on the amount so received, kept and paid.	
Preparing the record for the printer, indexing same, supervising the printing and distributing the copies, for each printed page of the record and index.....	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words, (but nothing in addition for supervising the printing).....	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing.....	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy) ..	1 00
Attorney's docket fee.....	20 00
See ante, § 710 of Code.	

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process, in the nature of a procedendo, shall be issued to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after the expiration of twenty days from the date of the judgment or decree.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.**MODELS, DIAGRAMS, and EXHIBITS OF MATERIAL.**

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams, and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.**SATURDAYS CONFERENCE DAY.**

The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

36.**BANKRUPTCY.**

Upon the filing of the petition for review as provided for in section 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

2. The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition.

3. Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for in the 23rd rule of this court and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. That all causes coming up by appeal as provided in section 25 of said Bankruptcy Act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

Instructions of the clerk of the Supreme Court respecting certiorari applications, will be found appended to the Supreme Court rules, ante.

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INSTRUCTIONS AS TO TAKING APPEALS, SUING OUT WRITS OF ERRORS, MAKING UP RECORDS, Etc.

(Prepared by Henry T. Meloney, Clerk United States Circuit Court of Appeals, Fourth Circuit.)

Method of Taking Appeals.

Writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding thirty days from the day of signing the citation, whether that day, which is the return day, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the return day, unless the time be enlarged as provided in Sec. 1 of Rule 16. In that case the order of enlargement must be filed with the clerk of this court.

Rule XI. entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the court below, with his petition for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court;" and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or supersedes bond, and signs the citation.

In cases brought up by writ of error, from either the circuit or district courts, the clerk of the circuit court, or the clerk of this court, issues the writ of error, which writ fixes the return day of the writ to this court, and the citation should bear the same return day. But in cases of appeal (in admiralty or in equity), the citation alone fixes the return day.

All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner:

1. Petition in writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation.

2. The petition must be accompanied with an assignment of errors, and a prayer for reversal.

3. Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ.

4. Order in writing of the judge allowing the writ of error or appeal.

5. Issuing the writ of error by the clerk of the circuit court, or of this court.

6. In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of \$5 for issuing it, must be trans-

mitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below.

All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error see Sec. 1007, R. S.)

Rules of this court, blank writs of error, appeal and supersedeas bonds, citations, and orders of appearance may be had of the clerks of the lower courts or of the clerk of this court upon application.

Making Up Records.

In making up a transcript of the record, clerks are requested to make a distinct title or heading to each paper or proceeding copied into the record, with the date of filing the same, or the date of such proceeding, and to write upon but one side of the paper in a clear, legible hand. And a complete index should be made and attached to the record at the beginning of it.

In order to have uniformity, records should be commenced with the style and the term of the court at which the judgment or decree is entered, after the following form:

"The United States of America,

District of, to-wit:

At a Circuit (or District) Court of the United States for the District of, begun and held at the Court-house in the city of, on the first Monday of, being the day of the same month, in the year of our Lord one thousand, nine hundred and

Present: The Honorable Circuit Judge, or Judge of the District of

Among other were the following proceedings, to-wit:

A. B.	{	In Equity (or)
vs.		In Admiralty (or)
C. D.	{	At Law.

BILL OF COMPLAINT (or)

LIBEL (or)

DECLARATION (or COMPLAINT)

Filed,, 190 (date of filing)."

(Copy same with endorsements, and any accompanying papers and exhibits, and so on with every paper or proceeding in the case.)

Every paper or proceeding should have a proper heading or title stating what follows, and the date of the filing of the paper, or of the proceeding.

A complete record, as required by Rule 14, must be made in all cases

(for record in admiralty cases see section 6 of that rule), but as to the general order of making up a record, the following examples are given:

In Equity.	In Admiralty.	At Law.
1. Style of Court as Above.	1. Style of Court as Above.	1. Style of Court as Above.
2. Bill of Complaint, etc.	2. Libel.	2. Declaration.
3. Process.	3. Process.	3. Process.
4. Marshal's Return.	4. Marshal's Return.	4. Marshal's Return.
5. Answer.	5. Claim.	5. Plea or Demurrer, etc.
6. Replication.	6. Stipulation.	6. Joining of Issue.
7. Testimony and Exhibits for Complainant.	7. Answer.	7. Impanneling Jury.
8. Testimony and Exhibits for Defendant.	8. Testimony and Exhibits for Libellants.	8. Verdict.
9. Testimony and Exhibits in Rebuttal (if any).	9. Testimony and Exhibits for Respondent.	9. Judgment.
10. Opinion.	10. Testimony and Exhibits in Rebuttal (if any).	10. Bill of Exceptions.
11. Decree.	11. Opinion.	11. Petition for Writ of Error.
12. Petition for Appeal.	12. Decree.	12. Assignment of Errors.
13. Assignment of Errors.	13. Petition for Appeal.	13. Bond and Approval.
14. Appeal Bond and Approval.	14. Assignment of Errors.	14. Order Allowing Writ.
15. Order Allowing Appeal.	15. Appeal Bond and Approval.	15. Writ of Error.
16. Citation.	16. Order Allowing Appeal.	16. Citation.
17. Clerk's Certificate.	17. Citation.	17. Clerk's Certificate.
	18. Clerk's Certificate.	

The numerical order of the above list of proceedings may be transposed whenever the order of the proceeding is different.

It is impossible to give information and direction to cover the details of every case, for there are not two cases like; but the above covers the substantial parts of every case.

While a full record is necessary, yet it is expected that counsel on both sides will exercise care that no matter not necessary to a full and complete review of the case shall be put into the record. Whenever any agreement shall be entered into by counsel with regard to the making up, or the printing of the record under Rule 23, the agreement must be copied into the record.

In making up records in admiralty cases the following should be omitted (see Rule 52 of the Supreme Court, in Admiralty):

1. The continuances.
2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

All records are transmitted to the appellate court by order of the court below; and if such order is not expressed in writing, it is implied, and the clerk should always enter immediately preceding his certificate the following order:

"And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste. _____, Clerk."

Then comes the general certificate of the clerk, in the usual form, that the foregoing is a full and true record, etc., with the seal of the court attached.

DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term, or adjourned term, occurring thereafter, provided the record has been or can be printed ten days before the said term or adjourned term, as provided in Rule 23. All records must be printed under the supervision of the clerk of this court.

Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant or plaintiff in error, and also with a deposit of \$25 for account of costs of this court, and the names and addresses of the attorneys on both sides.

The clerk of this court will, immediately upon a record being filed, send to the counsel an estimate of the cost of printing, supervising fees, etc., which amount must be deposited, either in cash or by New York exchange, with the clerk within ten days after notice. See Rule 23.

It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ of error is allowed, and not held until the near approach of the next term.

Defendants in error, or appellees, are required to make a deposit of \$20, at the time of entering their appearance by attorney, for account of costs to be incurred by them in this court. In case of affirmance, or dismissal, when all costs shall have been paid by the plaintiff in error, or appellant, the said deposit will be returned. This is applicable to all cases except when the United States is defendant in error or appellee.

RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

FIFTH CIRCUIT.

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Fifth Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Fifth Circuit" in two lines in the center, with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

A session of this court shall be held annually at the City of Atlanta, Georgia, on the first Monday in October; at the City of Montgomery, Alabama, on the third Monday in October; at the City of Forth Worth, Texas, on the first Monday in November; at the City of New Orleans, Louisiana, on the third Monday in November, and shall be adjourned to such other time and places as the court may from time to time order and designate.

(As amended January 12th, 1905.)

See ante, § 311 of Code.

4.

QUORUM.

1. If at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time; or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept in the City of New Orleans.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by Section 794 of the Revised Statutes, and shall give bond in the sum of ten thousand (\$10,000) dollars, and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER AND OTHER OFFICERS.

The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or any Circuit Court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the followings form, viz:

"I,, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States."

(a copy of which shall be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellors eligible to admission as an attorney and counsellor of this court may be admitted to practice, on motion in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll.

On each admission the clerk will collect ten dollars (\$10.00) to be applied to the purchase of law books for the use of the court and bar.

(As amended December 18, 1900.)

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.**PROCESS.**

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.**BILL OF EXCEPTIONS.**

The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.**ASSIGNMENT OF ERRORS.**

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.**OBJECTIONS TO EVIDENCE IN THE RECORD.**

In all cases of equity or admiralty jurisdiction heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.**SUPERSEDEAS AND COST BONDS.**

1. Supersedeas bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and

costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and cost and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a Circuit or District Court the appellant shall, at the time of the allowance of said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain the appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the records, bill of exception, assignment of errors and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this court upon writ of error or appeal such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error and citations must be made returnable and the transcript filed in the clerk's office at New Orleans not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

Provided, however, that appeals taken from interlocutory decrees under

the seventh section of the act entitled "An act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and amendments thereto, shall be made returnable not exceeding ten days from the day of taking the same.

(As amended January 12th, 1905.)

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown, any judge of this court may enlarge the time by or before its expiration, the order, of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of this court.

(As amended June 20, 1895.)

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

(Sec. 4, adopted April 23, 1895.)

See ante, § 1978 of Code.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the judgment or decree reversed, if it be erroneous; provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representative of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a Circuit or District Court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the Circuit or District Court and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous; provided, however, that a proper citation, reciting the substance of such order, shall be served upon such representative either personally or by being left at his residence, at least thirty days before the expiration of such ninety days; provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit and thereupon the suit shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal shall by their attorneys

of record sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case has been called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

23.

PRINTING RECORDS.

1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing the case may be dismissed at the discretion of the court.

(As amended January 12th, 1905.)

See ante, 1994 of Code.

2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

See ante, § 1994 of Code.

3. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

See ante, § 1994 of Code.

4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

See ante, § 1994 of Code.

(As amended Dec. 8, 1905.)

5. The clerk shall supervise the printing and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(1) Commissions to take testimony, and the formal captions to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(2) All process in the nature of subpoenas, citations, summons and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.

In every transcript wherein any pleading, exhibit or other paper appears at more than one place, such pleading, exhibit or other paper shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

See ante, § 1994 of Code.

6. In case of reversal, affirmance or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fee for super-

vising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

See ante, § 1853 of Code.

7. The clerk shall receive from either party, and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sums therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

See ante, § 1994 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error, appellant or petitioner shall file with the clerk of this court, at least fifteen days in ordinary cases, and five days in preference cases, before the case is called for argument twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case; one copy of the brief shall, on application, be furnished to each of the counsels engaged upon the opposite side.

(As amended January 12, 1905.)

2. This brief shall contain, in order here stated:—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3 The counsel for defendant in error, appellee or respondent shall file with the clerk of this court, at least five days before the case is called for argument in ordinary cases and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant or petitioner, except that on specification of errors shall be required and no

statement of the case, unless that presented by the plaintiff in error, appellant or petitioner is controverted.

(As amended January 12, 1905.)

4. When there is no assignment of errors, as required by Sec. 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appsals they shall be argued together as one case and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

(As amended February 27, 1894.)

See ante, § 2080 of Code.

26.

FORM OF PRINTED ARGUMENTS AND BRIEFS.

All arguments, briefs, motions and petitions for rehearing printed for the use of the court must be printed on white book paper size of paper page, trimmed, to be $6\frac{1}{4} \times 9\frac{1}{4}$ inches; size of type page to be 4×7 inches, exclusive of folio line; margin to be properly arranged with view of rebinding. Type must not be smaller than long primer.

(As amended May 29, 1900.)

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

See ante, § 1993 of Code.

28.**OPINIONS OF THE COURT.**

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.**REHEARING.**

A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, or one of the judges, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it and a majority of the court so determines.

(As amended January 12, 1905.)

See ante, § 2130 of Code.

30.**INTEREST.**

1. In cases where a writ of errors is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

See ante § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent. in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases of admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.**COSTS.**

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed

to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, § 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

32.

MANDATE.

Mandates shall issue at any time after twenty-one days from the date of the decision, unless an application for a rehearing has been granted or is pending. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case.

Provided that in all cases entitled to precedence in this court under Section 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

(As amended January 12, 1905.)

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded

to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

ORDER IN RELATION TO ASSIGNMENT OF CASES FOR HEARING.

Unless otherwise ordered by the Senior Circuit Judge, thirty days prior to the opening of a regular session of this Court, the Clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week;

At Montgomery, Alabama, four cases per day for the first three days of each week;

At Fort Worth, Texas, four cases per day for the first three days of each week;

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeals, writs of error and other appellate proceedings in the Fifth Judicial Circuit provided, that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases, whether preference or not, upon stipulation of the parties filed with the clerk and approved by the Court, be assigned for hearing at any other place or session of this Court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans.

Louisiana, shall be grouped by States, so as to permit the hearing of cases from one State before the cases from the next State in order shall be called.

(As amended October 15th, 1906.) See ante, § 2055.

36.

ASSIGNMENT OF JUDGES.

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, in the order of seniority of their respective commissions and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

(Adopted June 23, 1892.)

37.

WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or Circuit Court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1897—may be allowed in term time or in vacation by the circuit justice assigned to this circuit by either of the circuit judges, or by any district judge who presided on the trial, and the proper security be taken, and the citation be signed by him, and he may also grant a supersedeas and stay of execution or proceedings pending the determination of such writ of error.

See ante, § 1924 of Code.

2. Where such writ of error is allowed in any criminal case as aforesaid, the circuit court or district court, before which the accused was tried, or the trial judge, or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

(Adopted June 11, 1897.)

See ante, § 1548 of Code.

APPENDIX TO RULE 37.

(Form of Appearance Bond on Writ of Error in Criminal Cases.)

Know all men by these presents:

That we, ———, as principal, and ———, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ——— dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ———, in the year of our Lord one thousand eight hundred and ninety——.

Whereas, lately at the ——— term, A. D. 189—, of the ——— court

of the United States for the _____ district of _____, in a suit pending in said court, between the United States of America, plaintiff, and _____, defendant, a judgment and sentence was rendered against the said _____, and the said _____ has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said _____ shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the City of _____, on the first Monday in _____, A. D. 189—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said _____ court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit then the above obligation to be void, else to remain in full force, virtue and effect.

_____ [Seal]

_____ [Seal]

_____ [Seal]

Approved:

Judge of the _____

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RULES

OF THE

United States Circuit Court of Appeals

FOR THE

SIXTH CIRCUIT.

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Sixth Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge, and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right, and the words "Sixth Circuit" in two lines in the center, with a dash beneath.

See ante, § 71 of Code.

3.

TERMS, HEARING AND CONTINUING OF CASES.

(As amended Dec. 2, 1902.)

1. One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September. At the July session no causes will be heard, except upon special order of the court.

A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January and April sessions.

2. All sessions of the court shall be held at Cincinnati unless otherwise specially ordered by the court.

3. The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way.

4. If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired.

But a case may be continued once by agreement of counsel in open court or by stipulation filed in the clerk's office to any session during the term. Subsequent continuances must be made by the court on motion for cause shown; and engagements of counsel in other courts will not be considered good cause for continuance.

5. Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court or stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

6. Two or more cases involving the same question may by leave of the court or by its order be heard together, but they must be argued as one case.

7. For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel.

See ante, §§ 309, 2055 of Code.

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process depending in or returned to the court, preparatory to hearing, trial or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counselor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by Section 794 of the Revised Statutes [ante, § 570 of Code], and shall give bond in a sum to be fixed, and with sureties to

be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER AND OTHER OFFICERS.

1. The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by Section 782 of the Revised Statutes. [See ante, § 625 of Code.]

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

7.

ATTORNEYS AND COUNSELORS.

All attorneys and counselors permitted to practice in the Supreme Court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States and upon subscribing the roll. The fee for such admission shall be ten dollars.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the president of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 439 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code. 1964

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction heard in this court no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court the appellant shall,

at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors and all proceedings in the case under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 2055 of Code.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every calendar session, as provided in Rules 3 and 37. And if a case is called for hearing at two calendar sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts

on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first session of the entry of the case, otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases, and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record and on hearing have the judgment or decree reversed if it be erroneous: Provided, however, that a copy of every such order shall be personally served on said representative at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested and the representatives of the deceased do not appear within ten days after the expiration of sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the

United States, or in the District of Columbia, and stating therein the name and character of such representative and the state or territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence at least thirty days before the expiration of such ninety days: Provided also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time, as above required, by the opposite party, the case shall abate: And provided also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2116 of Code.

Fed. Proc.—124.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

See ante, § 2112 of Code.

3. When a case is reached in the regular call of the docket and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

See ante, § 2114 of Code.

4. All causes shall stand for hearing when the time allowed for printing the record and the briefs of both parties shall have expired: Provided, however, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired.

23.

PRINTING RECORDS.

1. The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record, and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

See ante, § 1980 of Code.

2. After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same, and shall furnish to each of the respective parties three (3) copies thereof and take a receipt therefor.

See ante, § 1994 of Code.

3. Parties may agree by written stipulation, filed with or prior to the filing of the record, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The plaintiff in error or appellant may, within ten days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within fifteen days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not do so, he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which

the court shall think proper. If good cause be shown, the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session, or by either circuit judge, if eligible to sit in the cause.

See ante, § 1994 of Code.

4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

See ante, § 1994 of Code.

5. In case of reversal, affirmance or dismissal with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

See ante, § 1853 of Code.

6. In any case where the record shall have been printed in the court below either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require, as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee provided in table of costs, Rule 31, shall be charged and collected by the clerk.

See ante, § 1994 of Code.

7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

See ante, § 1994 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error shall file with the clerk of this court, within twenty-five days after the filing of the printed copies of the record, as required in Rule 23 as amended, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated,

(1.) A concise abstract or statement of the case, presenting succinctly the questions involved in the manner in which they are raised;

(2.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute

of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief within forty days after the filing of the printed record, as required by Rule 23. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no statement of the case shall be required, unless that presented by the plaintiff in error or appellant is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary and by request of the court.

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: Provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

1. All records shall be of a uniform size, printed in small pica type, 24 pica ems to a line, 48 lines to a page, solid, with an index and a suitable cover, containing the title of the court and cause, the court from which the case is brought to this court and the number of the case; size of pages to be $9\frac{1}{4} \times 6\frac{1}{4}$ inches, except that in patent cases the size of the pages shall be $10\frac{3}{4} \times 7\frac{7}{8}$ inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding.

2. All arguments and briefs of attorneys shall be printed and conform as near as practicable to the size of the printed record.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded, in accordance with paragraph 7, Rule 23.

3. Opinions printed under the supervision of the clerk need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

4. The cost of printing the opinions shall be defrayed out of the amount received for the same, and any deficit shall be paid out of such fees collected by the clerk as are not properly taxable as costs in any case pending in the court.

See ante, § 2108 of Code.

29.

REHEARINGS.

A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent in addition to interest shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.
COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court.

See ante, § 1849 of Code.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code

5. When costs are allowed in this court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

Table of Costs.

Order Promulgated by the Supreme Court of the United States February 28, 1898.

Ordered, in pursuance of the Act of Congress of February 19, 1897 (29 Stat. 536, c. 263), that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	\$ 5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00

Affixing a certificate and a seal to any paper	1 00
Receiving, keeping and paying money in pursuance of any statute or order of court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies for each printed page of the record and index	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate, or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee	20 00
See ante, § 710 of Code.	

32.

MANDATE.

In all cases finally determined in this court a mandate or other proper process in the nature of a procedendo shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by Rule 29; and no mandate or other process of procedendo shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety,

for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS AND EXHIBITS OF MATERIALS.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

TESTIMONY IN ADMIRALTY CASES AFTER APPEAL.

In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of a United States court or a United States commissioner by direction of the court, the circuit justice, or either circuit judge qualified to sit on appeal in said case, after cause shown to such court, justice or judge that such evidence is material and necessary and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice or judge, upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories) and upon cross interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof to be served upon counsel offering testimony.

See ante, § 2090 of Code.

36.

DISPOSITION OF FEES NOT COSTS IN CASES.

All fees collected by the clerk which are not properly taxable as costs in any case pending in the court, and which are not by law required to be deposited by him in the treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court by the clerk, under the direction of the court. And it shall be the duty of the clerk to render to the court, for its examination and approval, a quarterly account of such fees received and disbursed by him.

37.

APPEAL OR WRIT OF ERROR MAY BE ALLOWED.

1. An appeal or writ of error from a circuit court or a district court

to this court in the cases provided for in Sections 6 and 7 of the act entitled "An Act to establish Circuit Courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, and acts to amend said act, approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice, or by either circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

See ante, § 1924 of Code.

2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

See ante, § 1548 of Code.

(The above was formerly Rule 38. On December 2, 1902, Rule 37 was ordered stricken out, and Rule 38 thereafter numbered 37.)

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RULES

OF THE

United States Circuit Court of Appeals

FOR THE

SEVENTH CIRCUIT.

1.

NAME.

The title of the court shall be "United States Circuit Court of Appeals for the Seventh Circuit."

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge, and the words "Circuit Court of Appeals," on the lower part of the outer edge, running from left to right, and the words "Seventh Circuit" in two lines, in the center with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

A term of this court shall be held annually at the City of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such time and places as the court may from time to time designate. Unless otherwise specially ordered, the Court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October and January, respectively, and the second Tuesday in April. [As amended January 9, 1903.]

See ante, § 309 of Code.

4.

QUORUM.

1. If, at any term or session, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term or session, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without a day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court preparatory to hearing, trial or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at Chicago.

2. The clerk shall not practice either as attorney or counsellor, in this court or in any other court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by § 794 of the Revised Statutes, [ante, § 570 of Code] and shall give bond in a sum to be fixed and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court shall direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office without an order from the court.

5. All fees collected by the clerk which are not properly taxable as costs in any case and which are not by law required to be by him deposited in the Treasury of the United States, shall constitute a fund to be expended by the clerk under the direction of the court in the purchase of law books for the library of the court.

6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk and separately from all individual accounts in a national bank designated by the senior judge; and at the end of each month and whenever required by the court or senior judge shall submit to the senior judge a detailed report showing by items all moneys received and all paid out during the month and the total balances on hand from each and all sources of receipt. Each report shall be accompanied by a statement over the signature of the cashier or other officer of the bank in which the deposit is kept of the amount in the bank to the credit of the clerk at the close of the last day included in the report.

See ante, § 563 of Code.

6.

MARSHAL CRIER AND OTHER OFFICERS.

1. The crier and bailiffs of the court, before entering upon their duties, shall take an oath in the form prescribed by § 782 of the Revised Statutes.

See ante, § 625 of Code.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors, admitted to practice in the Supreme Court of the United States or in any Circuit Court of United States, or in the Supreme Court of a State in this circuit, may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll.

See ante, § 691 of Code.

8.

PRACTICE.

The practice, so far as may be, shall be the same as in the Supreme Court of the United States.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS AND TRANSCRIPT.

1. The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, and upon any general exception to the whole of said charge. But the party excepting shall be required to state distinctly the several matters of law in the charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

2. A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review, and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

See ante, § 1932[bb].

3. No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript unless required by written praecipe, of which a copy shall also be set out.

See ante, § 1956[b].

4. The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein, and will tax the cost of the reference as shall seem just.

11.

ASSIGNMENTS OF ERRORS.

The plaintiff in error, or appellant, shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall specify separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the specification of the error shall quote the full substance of the evidence admitted or rejected. When the evidence rejected is oral testimony a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury. When the error alleged is to the charge of the court, each specification of error shall set out the part referred to *todidem verbis*, whether it be instructions given or in instructions refused, and shall state distinctly the grounds of objection to an instruction given. Such assignment or errors shall form part of the transcript of the record and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned. (See Rule 24, post).

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall be otherwise deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken with good and sufficient security, that the plaintiff in error or appellant will prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and interest and costs on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and

the costs of the suit and damages for delay and interest and costs on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal. See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignments of errors, and all proceedings in the case necessary to the hearing in this court, under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written praecipe stating in detail what the transcript shall contain and when a praecipe is filed shall insert a copy thereof in the transcript.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

See ante, § 1969 of Code.

3. No case will be heard until a complete record shall have been filed, containing in itself, and not by reference, all papers, exhibits, depositions, and other proceedings necessary to the hearing in this court.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeals, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connecting with the transcript of the proceeding.

See ante, § 1971 of Code.

5. All appeals, writs of error and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another resident be designated of record in the case upon whom service may be made.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be

made up as provided in General Admiralty Rule No. 52 [ante, § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal had been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument in due course.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.

DOCKET.

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session; placing thereon in proper chronological order only

cases in which the record shall have been printed fully thirty days before such term or session and those causes in which, the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party be verified by affidavit. And any motion for such certiorari must be made at the first term of the entry of the case, otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and be admitted parties to the suit, and thereupon the case shall be heard and determined as other cases, and of such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous. Provided, however, that a copy of every such order shall be personally served on such representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measure shall have been taken by the opposite party within that time to compel their appearance, the writ of error or appeal shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory in the United States, or in the District of Columbia, the party desiring such writ of error or appeal

may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall, thereupon, proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or district in which such representative resides, and upon such suggestion, he may on motion obtain an order that unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous:

Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days:

Provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as other cases. (See § 9, act of March 3, 1875. Sup. Rev. Stat. p. 177.)

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the parties to a writ of error or an appeal shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, in respect to costs, and shall pay to the clerk any fees that may be due to him, the clerk shall enter the case dismissed, and shall give to either party requesting it a copy of the agreement filed, but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and the object of the motion.

2. One-half hour on each side shall be allowed for the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the other party may have the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. If the appellee or defendant in error fails to appear when the case is called, the court may proceed to hear argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, and no brief on file for the appellant or plaintiff in error, the case shall be dismissed at the cost of the appellant or plaintiff in error.

See ante, 2114 of Code.

23.

PRINTING THE RECORD.

1. In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

See ante, § 1980 of Code.

2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

See ante, § 1994 of Code.

3. The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts.

See ante, § 1994 of Code.

4. The clerk shall cause at least twenty-five copies of the record to be

printed and may print a larger number on the request of either party on the payment of the amount necessary for the printing of such extra copies.

See ante, § 1994 of Code.

5. The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof.

See ante, § 1994 of Code. *

6. In case of reversal, affirmance or dismissal with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

See ante, § 1853 of Code.

7. Upon the clerk's producing satisfactory evidence by affidavit, or by the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties, respectively, to compel the payment of said fees.

8. The clerk shall adopt a uniform size for the printing of all records, shall have them printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, shall show by note or memorandum on the margin the time when each pleading or document was filed, and at the top of the pages shall insert running title of their contents.

9. The briefs of attorneys shall be printed, and shall conform as nearly as practicable to the size of the printed record.

10. The clerk shall, on or before the conclusion of each case, collect and file or otherwise preserve together one copy of the printed record and of each brief, printed motion and argument submitted therein.

11. In any case where the record shall have been printed in the court below, in substantial conformity to these rules, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to such record an index, and shall be paid the same fees for the indexing and supervising thereof as if printed under his supervision.

12. The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who may award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies when printing

may be done by another at the same or less price. And when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid.

See ante, § 1994 of Code.

13. The fees of the clerk of this court, as prescribed by order of the Supreme Court, made February 28, 1898, are as follows:

Docketing a case and filing the record	\$5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order, or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy) ..	1 00
Attorney's docket fee	20 00

See ante, §§ 705, 710 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, within twenty days after the date of the delivery by the clerk of the printed record, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated, and under the respective titles. "Statement of Case," "Errors Relied Upon," and "Brief of Argument:"

(1.) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged, and in cases brought up by appeal the speci-

cation shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in an instruction given or in one refused. When the error alleged is to a ruling upon the report of a master the specifications shall state the exception to the report and the action of the court upon it. Following each specification there shall be a reference by page to the portion of the printed record on which the question arises.

(3.) A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for the defendant in error or the appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall conform to the requirements of this rule except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

4. When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court, and errors not specified according to this rule, and rule 11, ante, will be disregarded; but the court at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below.

5. When, according to this rule, a plaintiff in error or appellant is in default, the case may be dismissed on motion, and when a defendant in error or appellee is in default, he will not be heard except on consent of his adversary, or by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument has been filed, only one counsel will be heard for the adverse party, but if a printed brief or argument has been filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument and no more, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

4. Reading at length from briefs or reported cases shall not be indulged. See ante, § 2080 of Code.

26.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

27.

REHEARING.

A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.

See ante, § 2130 of Code.

28.

INTEREST.

1. When a judgment for the payment of money is affirmed by this court, the interest thereon shall be calculated and levied from the date of the judgment below until the same is paid, and at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent. in addition to interest, shall be awarded on the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

29.

COSTS.

1. When any suit shall be dismissed in this court, except for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In every case of a judgment or decree affirmed in this court costs shall be allowed to the defendant in error or appellee unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In every case of reversal of a judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. No costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and to annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

30.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a precendendo shall be issued, on the order or by the rule of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

See ante, § 2133 of Code.

31.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good

cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the Appellate Court except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

32.

MODELS, DIAGRAMS AND EXHIBITS.

Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court on writ of error or appeal, shall be placed in the custody of the marshal for the use of this court at least ten days before the case is heard or submitted; and shall be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy or make such other disposition of them as to him may seem best.

See ante, §§ 2037, 2039 of Code.

33.

LAW LIBRARY.

1. The library of the court shall be under the general supervision and custody of the clerk of the court.

2. No book shall be removed from the library except by or upon the written order of a federal judge or the United States district attorney for his own use in Chicago, except that during the sessions of the court any lawyer who has a case upon the docket, upon written application to the clerk and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours, and in default of return shall pay to the clerk for the library fund twice the value thereof, but if returned in good condition one dollar for each day's detention beyond the limited time.

3. Members of the bar of the court may have access to the library at any time during business hours.

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RULES OF THE UNITED STATES COURT OF APPEALS.

EIGHTH CIRCUIT.

1.

NAME.

The court adopts "United States Circuit of Appeals for the Eighth Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Eighth Circuit" in two lines, in the center, with a dash beneath. [See specimen of seal below.]

See ante, § 71 of Code.

3.

TERMS.

Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September and one at the city of St. Louis on the first Monday of December.

Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of April and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May term of the court in St. Paul.

Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts are filed on or before the 1st day of July and cases from the remainder of the circuit in which transcripts and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver.

Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the first day of October and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts and stipulations of the parties for their hearing at the December term in St. Louis

are filed on or before the first day of October, and those only, will be heard at the succeeding December term in St. Louis.

These terms of the Court may be adjourned to such time and places as the court may from time to time designate.

Promulgated June 16, 1902.

See ante, § 310 of Code.

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, and judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceedings or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court, at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes [ante, § 570 of Code], shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

See ante, § 563 of Code.

6.

MARSHAL, CRIER AND OTHER OFFICERS.

1. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any circuit court of the United States, or in the supreme court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors

in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counsellor admitted to practice in the courts of highest original jurisdiction in the States and Territories of this circuit, or in the supreme courts of such States and Territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counsellor of this court, upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court of Appeals for the Eighth Circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

Section 2. Promulgated June 27, 1892.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or re-

jected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the court to the jury.

Section 2. Promulgated February 10, 1896.

See ante, § 1969 of Court.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

7. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in

error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee, may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

Note:—A deposit of twenty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed.

See ante, § 1978 of Code.

17.

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of

the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment of decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally, or by being left at his residence,

at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objections of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff in error or appellant called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

See ante, § 2116 of Code.

3. When a case is reached in the regular call of the docket, and there

is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

See ante, § 2114 of Code.

23.

PRINTING RECORDS.

1. The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the records which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the records in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

See ante, § 1994 of Code.

2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the records so printed to each party at least sixty days before the argument.

See ante, § 1994 of Code.

3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

See ante, § 1994 of Code.

4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done.

See ante, § 1994 of Code.

5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

See ante, § 1994 of Code.

6. In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

See ante, § 1853 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least forty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2) A specification of the errors relied upon, which in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party;

but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appsals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS AND BRIEFS.

All records, arguments and briefs for the use of the court must be printed on paper not less than 6½ inches wide by 9¾ inches long, including margin, so that they can be conveniently bound together to make an ordinary octavo volume. Arguments and briefs not conforming to this rule will not be accepted or filed.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.

REHEARING.

1. A petition for rehearing after judgment, can be presented only at the term at which judgment is entered and before the issuance of a man-

date to the court below, except in cases in which the judgment of this court is entered within thirty days prior to the final adjournment of the term, and in such cases a petition for rehearing may be filed at the succeeding term within thirty days after the date of the final adjournment of the term at which the judgment was entered.

2. Such petition for rehearing must be printed and twenty copies thereof filed with the clerk and must briefly and distinctly state its grounds, and be supported by a certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise by this court.

See ante, § 2126 of Code.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the

United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

32.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Note:—By an order entered February 20, 1893, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, sixty days after the final disposition thereof, excepting in cases dismissed under the provisions of rule twenty, and section one of rule sixteen, and except in cases where it shall be otherwise expressly ordered.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on

writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any district or circuit court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1887—may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

See ante, § 1924 of Code.

2. Where such writ of error is allowed in the criminal cases aforesaid, the circuit court or district court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

Promulgated February 23, 1897.

See ante, § 1548 of Code.

36.

PETITIONS FOR REVIEW.

1. A petition for review, under the provisions of section 24 b, of the bankruptcy law, approved July 1, 1898, [ante, § 2361 of Code], shall be filed and docketed as an original action in this court, and be entitled "In Re..... Petitioner," and shall specifically designate the person or persons upon whom the petitioner desires notice to be served.

37.

ORDER OF COURT.

1. Upon the filing of a petition for review, the same shall be presented to the court, or one of the circuit judges, for an order fixing the return day to the notice required by law.

2. When such petition is accompanied by a written consent that the petition for review may be filed and a waiver by the defendant or defendants, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk pursuant to rules forty and forty-two.

38.

NOTICE.

1. The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the defendant or defendants and be served by the marshal of this court, unless an acknowledgment or acceptance of service thereof is made by the defendant or defendants, or their counsel.

39.

RESPONSE.

1. The response to the petition, when the defendant elects to make a written response, shall be filed at least fifteen days before the day set for the hearing.

40.

PRINTING OF RECORD.

1. The clerk shall cause the petition and exhibits thereto, if any, and the order, notice and response, if any, to be printed, and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

41.

BRIEFS AND ARGUMENTS.

1. Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed ten days before the day set for the hearing and twenty copies of the brief and argument for the defendant or defendants shall be printed and filed on or before the day of hearing.

42.

HEARING.

1. Petitions for review filed in vacation, shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.

2. Petitions for review filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

3. Petitions for review assigned by the clerk in their regular order as provided in section one of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

43.

COSTS.

1. The costs and fees now provided by law in cases upon appeal or writ

of error, shall, so far as the same are applicable, be taxed on petitions for review.

2. Upon the determination of a petition for review such order as to costs will be made as the court may deem necessary.

44.

PROCEDENDO.

1. In all cases on a petition for review wherein the action or judgment of the district court, complained of, is disapproved by this court, the clerk shall, at the expiration of ten days from and after the date of entering judgment in this court, issue process in the nature of a procedendo to the said district court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such district court in conformity with the judgment of this court.

2. In all cases on petition for review, wherein the action or judgment of the district court, complained of, is approved or confirmed or said petition dismissed by this court the clerk shall forthwith certify that fact to the district court.

45.

APPEALS AND WRITS OF ERROR IN BANKRUPTCY CASES.

1. The appeals and writs of error provided for by section twenty-five of the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

 ADDENDA.

[Form of Writ of Error for use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the (1).....

.....Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said.....Court, before you, at the.....Term, 19 , thereof, between (2).....

a manifest error hath happened, to the great damage of the said (3)..... as by complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals,

for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the (4).....day of19 , to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this.....day ofin the year of our Lord one thousand nine hundred

Issued at office in.....with the seal of the (5).....and dated as aforesaid.

.....
Clerk of.....

Allowed by

.....
.....Judge.

[form of Return to be endorsed on Writ of Error by the Clerk of the Court to which the Writ is addressed.]

United States of America,

..... } ss.

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of (6)

.....
Clerk of.....

Notes—(1) Here insert correct name of the Court to which the writ is addressed and whose judgment is to be reviewed.

(2) Here insert correct style of cause showing who was plaintiff and who defendant in Court below.

(3) Here insert name of party who sues out writ of error.

(4) Rule XIV. subdivision 5, requires writs of error and appeals to be made returnable sixty days after citation is signed.

This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

(5) See Section 1004 R. S. and Section 11, act March 3, 1891. This blank should be so filled as to show whether the writ is issued by the clerk of a United States Circuit Court or by the Clerk of the Circuit Court of Appeals.

(6) Here describe the Court to which the writ is addressed.

[Form of Citation.]

United States of America,

To Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to (1).....filed in the Clerk's Office of the (2)..... whereinis (3)..... and you are (4).....to show cause, if any there be, why the (5).....rendered against the said (6).....as in said (7).....mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable (8) Judge ofthis.....day ofA. D. 19...

Judge of.....

Notes—(1) Insert (a writ of error) or (an appeal allowed and).

(2) Insert name of Court to which writ of error is addressed, or from which appeal is allowed.

(3) Insert Plaintiff in Error or Appellant.

(4) Insert Defendant in Error or Appellee.

(5) Insert Judgment or Decree.

(6) Insert Plaintiff in Error or Appellant.

(7) Insert Writ of Error or Appeal.

(8) As to whom may sign citation, see Sections 998 and 999 R. S., U. S. and Section 11, act March 3, 1891, establishing Circuit Courts of Appeals.

[Form of Supersedeas or Cost Bond.]

Know all Men by these Presents,

That we, are held and firmly bound unto..... in the full and just sum ofto be paid to the saidheirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seats, and dated this..... day of, in the year of our Lord one thousand nine hundred.....

Whereas, lately at theterm of the..... in a suit depending in said Court between....., plaintiff, and....., defendant,.....was rendered against the said.....and the said..... has obtained of the said Court to reverse the.....in the aforesaid suit, and a citation directed to the said.....citing

and admonishing.....to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said shall prosecute said to effect, and answer all damages and costs if fail to make good.....plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

.....[Seal.]

.....[Seal.]

.....[Seal.]

Approved by

.....
(The foregoing bond and citation is adapted for appeals in Equity cases as well as in cases of writs of error in actions at law.)

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all Men by These Presents,

That we,
as principal, and.....
as sureties, are held and firmly bound unto the United States of America in the full and just sum of.....Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this.....day of.....
in the year of our Lord, One Thousand Nine Hundred.....

Whereas, lately at the.....Term, A. D. 190., of the.....
.....Court of the United States for the.....District
of....., in a suit depending in said Court between
the United States of America, plaintiff, and.....
.....defendant,
a judgment and sentence was rendered against the said
.....and the said

.....
ha obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said
.....
shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said

writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the Court of the United States for the District of on such day or days as may be appointed for a retrial by said Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

.....[Seal]
.....[Seal]
.....[Seal]

Approved:—

.....
Judge of the

List of
STATES AND TERRITORIES.
comprising the
EIGHTH CIRCUIT.

- | | |
|------------|-------------------|
| Arkansas, | North Dakota, |
| Colorado, | South Dakota, |
| Iowa, | Wyoming, |
| Kansas, | Utah, |
| Minnesota, | Indian Territory, |
| Missouri, | New Mexico, |
| Nebraska, | Oklahoma. |

RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Ninth Circuit" as the title of the court.

2.

SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Ninth Circuit" in two lines, in the center, with a dash beneath.

See ante, § 71 of Code.

3.

TERMS.

One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

See ante, § 311 of Code, also see Rule 36 post.

4.

QUORUM.

1. If, at any term or session, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, preceeding or process depending in or returned to the court, preparatory to hearing, trial or decision thereof.

See ante, § 307 of Code.

5.

CLERK.

1. The clerk's office shall be kept at San Francisco, California.
2. The clerk shall not practice, either as attorney or counselor, in this

court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes [see ante, § 570 of Code], and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safekeeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the courtroom or from the office, without an order from the court, except as provided in Rule 23.

See ante, § 563 of Code.

6.

MARSHAL, CRIER AND OTHER OFFICERS.

1. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may from time to time order.

7.

ATTORNEYS AND COUNSELORS.

All attorneys admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the Ninth Circuit, shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court, in said court, shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States and subscribe the Roll of Attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the Roll of Attorneys.

NOTE.—Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court.

See ante, § 491 of Code.

8.

PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

See ante, § 1887 of Code.

9.

PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

See ante, § 839 of Code.

10.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

See ante, § 1933 of Code.

11.

ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

See note to Admiralty Rule 1, post.

See ante, § 1931 of Code.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

See ante, § 2085 of Code.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody

of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

See ante, § 2015 of Code.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

See ante, § 2021 of Code.

14.

WRITS OF ERROR, APPEALS, RETURN AND RECORD.

See, also, Rules 16, 17, 23, 34, 35 and 36.

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

See ante, § 1953 of Code.

2. In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citations issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

See ante, § 1969 of Code.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court shall be filed.

See ante, § 2035 of Code.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

See ante, § 1971 of Code.

5. All appeals, writs of error, and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

See ante, § 1952 of Code.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 [ante, § 1289] of the Supreme Court.

See ante, § 1963 of Code.

15.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

See ante, § 1995 of Code.

16.

DOCKETING CASES.

See, also, Rules 14, 17, 23, 34, 35 and 36.

1. It shall be the duty of the plaintiff in error or appellant to file the record thereof and docket the case with the clerk of this court at San Francisco, California, by or before the return day, whether in vacation or in term time. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to file the record and docket the case after the same shall have been docketed and dismissed under this rule, unless by order of the court.

See ante, § 1974 of Code.

2. But the defendant in error or appellee may, at his option, file a copy of the record and docket the case with the clerk of this court; and if a copy of the record is filed and the case docketed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

See ante, § 1976 of Code.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of counsel for the party docketing the case shall be entered.

See ante, § 1978 of Code.

17.

DOCKET.

See, also Rule 16.

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and

enter upon a docket all cases brought to and pending in the court in their proper chronological order.

See ante, § 2055 of Code.

18.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

See ante, § 1997 of Code.

19.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

See ante, § 1899 of Code.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

See ante, § 1900 of Code.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this

court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State, or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, That in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See ante, § 1901 of Code.

20.

DISMISSING CASES BY AGREEMENT.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

See ante, § 2110 of Code.

21.

MOTIONS.

1. All motions to the court shall be reduced to writing, shall contain a brief statement of the facts and objects of the motion and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

2. One-half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court,

shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party.

See ante, § 2064 of Code.

NOTE.—When typewritten, an original and three copies should be filed.

22.

PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

See ante, § 2112 of Code.

2. When the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

See ante, § 2112 of Code.

3. Where a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

See ante, § 2114 of Code.

23.

PRINTING RECORDS.

1. All records shall be printed under the supervision of the clerk, and upon the docketing of the cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

See ante, § 1994 of Code.

2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

See ante, § 1994 of Code.

3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

See ante, § 1994 of Code.

4. The Clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the Judges and the reporter, and one or more printed copies to the counsel for the respective parties.

See ante, § 1994 of Code.

5. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the

amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

See ante, § 1994 of Code.

6. In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

See ante, § 1853 of Code.

7. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ten days thereafter, may designate, in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted.

See ante, § 1994 of Code.

8. At the time of filing the record and docketing the cause counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

See ante, § 1994 of Code.

9. The fee of the clerk for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index, twenty-five cents.

See ante, § 1994 of Code.

24.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument.

2. This brief shall contain, in order here stated—

(a) A concise abstract, or statement of the case; presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specifications shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is as to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

See ante, § 2071 of Code.

NOTE.—Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of Rule 7, will not be considered by the court.

See, also, sub. 2 of Rule 26.

25.

ORAL ARGUMENTS.

See, also, Rules 35 and 36.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-

appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. One hour on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

See ante, § 2080 of Code.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS, AND PETITIONS FOR REHEARING.

1. All records printed for the use of the court must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-ledged is the only mode of composition allowed.

2. All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide. Pica double-ledged is the only mode of composition allowed.

See ante, § 1985 of Code.

27.

COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs and arguments filed therein.

See ante, § 1993 of Code.

28.

OPINIONS OF THE COURT.

The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule.

See ante, § 2108 of Code.

29.

REHEARING.

See, also, sub. 2 of Rule 26 and Rule 32.

In cases from the District of Alaska a petition for rehearing may be presented within thirty days after judgment. In cases from all other districts a petition for rehearing may be presented within fifteen days

after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

See ante, § 2130 of Code.

30.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered.

See ante, § 2124 of Code.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent. in addition to interest, shall be awarded upon the amount of the judgment.

See ante, § 2125 of Code.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

See ante, § 2126 of Code.

4. In cases in admiralty damages and interest may be allowed, if specially directed by the court.

See ante, § 2127 of Code.

31.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

See ante, § 1843 of Code.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

See ante, § 1844 of Code.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court.

See ante, § 1848 of Code.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

See ante, §§ 1846, 1848 of Code.

5. When costs are allowed in this court it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process sent to the court below, and annex to the same the bill of items taxed in detail.

See ante, § 1852 of Code.

6. In all cases certified to the Supreme Court or removed thereto by

certiorari, or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

See ante, § 1983 of Code.

7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees.

See ante, § 1982 of Code.

32.

MANDATE.

See, also, Rule 29.

In all cases finally determined in this court a mandate or other proper process in the nature of a procedendo, at the request of counsel for the prevailing party and upon the payment of any costs due in the case, shall be issued as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued in cases from the district of Alaska on the expiration of thirty days, and in cases from all other districts on the expiration of fifteen days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition.

See ante, § 2133 of Code.

33.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

See ante, § 1686 of Code.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

See ante, § 1687 of Code.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

See ante, § 1688 of Code.

34.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of

error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

See ante, § 2037 of Code.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case must be taken away by the parties within one month after the case is decided. When this is not done it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them or make such other disposition of them as to him may seem best.

See ante, § 2039 of Code.

35.

ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court the clerk is directed to assign causes for hearing at the rate of one case for each Monday, and two cases per day for the following four days of each week. Causes shall be grouped by States, and assignments made so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes from the Northern District of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State.

2. A stipulation to continue a case to the foot of the calendar, or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reason shown.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

See ante, § 2055 of Code.

36.

TERMS AND SESSIONS OF THE COURT.

1. One term of this court shall be held annually on the first Monday of October, and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco, unless otherwise especially ordered by the court.

2. The October, February and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35.

3. A term of this court shall be held annually in the city of Seattle, in the State of Washington, and in the city of Portland, in the State of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the circuit and district courts for the District of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the

city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the circuit and district courts for the District of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the circuit and district courts for the Districts of Idaho and Montana, and from the district courts of Alaska may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

See ante, § 311 of Code.

37.

PHOTOGRAPH OF CHINESE TO BE ATTACHED TO BAIL BOND.

Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of the defendant shall be attached to said bond.

See ante, § 2406 of Code.

RULES IN ADMIRALTY.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

Adopted May 21, 1900, in effect first Monday in October, 1900.

1.

APPEALS AND NEW PLEADINGS.

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.

See ante, § 1934 [e] of Code.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.

See ante, § 2096 of Code.

NOTE.—This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules. (*Kenney v. Louie*, No. 939. Motion to dismiss appeal denied, May 6, 1903.)

2.

NOTICE AND BOND.

Sec. 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court a bond for costs of the appeal, with sufficient surety in the sum of \$250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

See ante, § 2023 of Code.

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a

judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

See ante, § 2024 of Code.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residences of the sureties, and if the appellee, within two days, excepts to the sureties they shall justify, on notice, within two days after such exception.

See ante, § 2025 of Code.

3.

REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

See ante, § 2096 of Code.

4.

APOSTLES ON APPEAL TO CONTAIN.

Sec. 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner, or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

See ante, § 1964 of Code.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

See ante, § 1965 of Code.

Sec. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

See ante, § 1966 of Code.

5.

CERTIFYING RECORDS.

The appellant shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the District Court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.

See ante, § 1967 of Code.

6.

IF APPEARANCE OF APPELLEE NOT ENTERED.

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.

See ante, § 2097 of Code.

7.

NEW ALLEGATIONS, ETC.

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and upon at least four days' notice to the adverse party or his attorney of record.

See ante, § 2090 of Code.

8.

NEW PLEADINGS—NEW TESTIMONY.

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter-testimony within twenty days after such filing.

See ante, § 2090 of Code.

9.

NEW TESTIMONY—HOW TAKEN.

Such testimony shall be taken by deposition before the Clerk of this Court, or any United States Commissioner, or any Clerk of a District or Circuit Court of the United States, or any Notary Public upon reasonable notice, in writing, given to the opposite party or his attorney of record,

either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.

See ante, § 2090 of Code.

10.

PRINTING NEW PLEADINGS AND TESTIMONY.

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the Clerk, as in the 23d General Rule provided.

See ante, § 1996 of Code.

11.

MOTIONS.

All motions shall be made upon at least four days' notice.

See ante, § 2065 of Code.

12.

EXTENSION OF TIME.

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

See ante, § 1941 of Code.

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